LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 19 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 155

HUGHES TOOL COMPANY,

Petitioner,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHESTER C. DAVIS
120 Broadway
New York, New York 10005
Attorney for Petitioner

Of Counsel:

CLIFFORD & MILLER
815 Connecticut Avenue, N.W.
Washington, D.C. 20036

ANDREWS, KURTH, CAMPBELL & JONES
25th Floor, Humble Building
Houston, Texas 77002

May 19, 1965.

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	10
Conclusion	27
Appendix A	
CAB Opinion and Order	1a
Appendix B	
Opinion and Judgment of Court of Appeals	10a
Appendix C	
CAB Petition for Rehearing	27a
Appendix D	
Statutory Provisions	35a

TABLE OF AUTHORITIES

Cases

Alleghany Corp. v. *Breswick & Co.*, 353 U.S. 151 (1957)	14

PAGE

Allegheny Airlines, Inc., Enforcement Proceeding, Order E-20336 (Jan. 6, 1964) 13

American Airlines v. *CAB,* 178 F.2d 903 (7th Cir. 1949) 14

American Airlines v. *CAB,* 231 F.2d 483 (D.C. Cir. 1956) 14

California Oregon Power Co. v. *FPC,* 239 F.2d 426 (D.C. Cir. 1956) 26

Chicago & So. Air Lines v. *Waterman S.S. Corp.,* 333 U.S. 103, (1948) 26

Ferenz v. *Folsom,* 237 F.2d 46 (3d Cir. 1956), *cert. denied,* 352 U.S. 1006 (1957) 14

FPC v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944) 26

Hughes-TWA-Atlas-Northeast Possible Common Control Case, 27 C.A.B. 155 (1958) 17n

Indiana-Ohio Local Service Case, 16 C.A.B. 880 (1953) 13

Lehman Brothers Interlocking Relationships Case, 15 C.A.B. 656 (1952), *aff'd sub nom. Lehman* v. *CAB,* 209 F.2d 289 (D.C. Cir. 1953), *cert. denied,* 347 U.S. 916 (1954) ... 22

Meteor-Metropolitan Aircraft Sale & Leaseback Proceeding, 26 C.A.B. 596 (1958) 15, 17n

National Airlines—Lewis B. Maytag, Jr., Order E-20701 (April 15, 1964) 13, 15

Pan American-National Agreement Investigation, 31 C.A.B. 198 (1960) 13

Rochester Telephone Corp v. *United States,* 307 U.S. 125 (1939) 14

PAGE

Seaboard & Western Airlines, Agreements, 32 C.A.B. 1322 (1960) 13, 15

Toolco-Northeast Control Case, Order E-21940 (March 23, 1965) 13, 15

Transcontinental & Western Air, Inc., Control by Hughes Tool Co., 6 C.A.B. 153 (1944) 4

Transocean-Atlas Case, Control & Interlocking Relationships, 29 C.A.B. 622 (1959) 15, 16

Trans-Pacific Freight Conf. v. *Federal Maritime Comm'n*, 314 F.2d 928 (9th Cir. 1963) 14

Trans World Air, Control by Hughes, 32 C.A.B. 1363 (1960) 5-6

Trans World Airlines, Further Control by Hughes Tool Co., 12 C.A.B. 192 (1950) 4

Trans World Airlines, Inc. v. *Hughes*, 332 F.2d 602 (2d Cir. 1964) 25

Statutes and Regulations

Administrative Procedure Act of 1946

Section 10(a), 5 U.S.C. § 1009(a) 3, 26n

Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*

Section 408 ..... 3, 6, 7, 14, 17, 18

Section 408(a) 4, 6n, 8, 9, 19, 22

Section 408(b) 6n, 8, 12, 18, 22

Section 409 5

Section 1005 3

Section 1006 3

Section 1006(a) 26n

PAGE

28 U.S.C. § 1254(1) 2

14 C.F.R. § 302.200 *et seq.* 23

Miscellaneous

Allen, *Section 408 of the Federal Aviation Act: A Study in Agency Law-Making,* 45 Va.L.Rev. 1073 (1959) 16n

Hale & Hale, *Competition or Control IV: Air Carriers,* 109 U.Pa.L.Rev. 311 (1961) ... 16n

Rhyne, *Civil Aeronautics Act Annotated* (1939) 16n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

HUGHES TOOL COMPANY,

Petitioner,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Hughes Tool Company ("Toolco") prays for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its judgment setting aside an order of the Civil Aeronautics Board ("CAB") permitting Toolco to terminate a voting trust and resume the exercise of control of Trans World Airlines, Inc. ("TWA"), one of the country's leading airlines and the only United States airline having both transcontinental and transatlantic routes.*

---

* This case involves a review, on the petition of TWA, of a CAB order. It is distinct from the antitrust litigation between TWA and Toolco considered by the Court this term in cases 443 and 501.

Opinions Below

The opinion and order of the CAB has not yet been officially reported. It is printed as Appendix "A" hereto, pages 1a-9a. The opinion of the Court of Appeals is reported at 339 F.2d 56, and is printed as Appendix "B" hereto, pages 10a-25a.

Jurisdiction

The judgment of the Court of Appeals was entered on December 7, 1964 (R. 359; see page 26a, Appendix "B" hereto).* Petitions for rehearing by the CAB (R. 456; Appendix "C" hereto, pages 27a-34a) and by Toolco (R. 462) were denied on February 11, 1965 and February 18, 1965, respectively (R. 515, R. 519, R. 523). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. May a reviewing court substitute its judgment for that of the CAB, in a matter which involves a basic and recurring regulatory function requiring the application of administrative expertise to the facts and circumstances of the particular case, where there is a rational basis for the decision of the CAB?

2. May a reviewing court terminate the effectiveness of an order of the CAB, which is not before the

---

* References to "R." are to pages of the record in the Court of Appeals as certified by the Clerk of that court and filed together with this petition.

court for review, upon the petition of a party who has never sought termination or modification of such order under the procedures established by the CAB?

3. May a reviewing court find an abuse of discretion in the failure of the CAB to hold a hearing on the basis of unproven charges, where the question whether such charges would warrant a hearing is a matter committed to agency discretion and the CAB has never been called upon to exercise and has not exercised its discretion in the matter?

4. Does a Court of Appeals have jurisdiction to set aside an opinion of the CAB, obtained by one contracting party in order that it might be in a position to exercise its rights under the contract, where review of the opinion of the CAB is sought by a stranger to the contract?

Statutes Involved

The statutory provisions involved are Sections 408, 1005 and 1006 of the Federal Aviation Act of 1958, as amended. (49 U.S.C. §§ 1378, 1485 and 1486, as amended) and Section 10(a) of the Administrative Procedure Act (5 U.S.C. § 1009(a)). The relevant portions of these provisions are set forth in Appendix "D" hereto, pages 35a-43a.

Statement of the Case

By this petition Toolco seeks review of a judgment of the Court of Appeals which sets aside an order of the CAB determining that the exercise by Toolco of certain contractual rights to terminate the Voting

Trust in which its TWA stock is presently held would not constitute a new acquisition of control of TWA within the meaning of Section 408(a) of the Federal Aviation Act of 1958 (the "Act").

Toolco is, and at all relevant times has been, the owner of a controlling stock interest in TWA, which it acquired with the approval of the CAB. In 1944, after a public hearing, Toolco's acquisition of control through its ownership of approximately 45% of the stock of TWA was approved, as consistent with the public interest, by an order of the CAB entered under Section 408 of the Act. *Transcontinental & Western Air, Inc., Control by Hughes Tool Co.*, 6 C.A.B. 153 (A-88).* Subsequently, Toolco increased its stock ownership to over 70%, and in 1950, after a second full public hearing, the acquisition of this further control was approved by the CAB. *Trans World Airlines, Further Control by Hughes Tool Co.*, 12 C.A.B. 192 (A-187, A-122). Pursuant to these orders, the CAB retained jurisdiction over every significant transaction between Toolco and TWA, and has since approved every such transaction through modification of its control orders. The orders authorizing control of TWA by Toolco have not been modified in any other respect, and have never been revoked.

Toolco has never parted with its stock interest in TWA, now having a market value in excess of $350 million. It has, however, permitted others to exercise its voting rights under a voting trust created in 1960 when TWA required large amounts of financing with

* References to "A-" are to the Appendix to Brief for TWA filed with the Court of Appeals in this case (2d Cir. Appeal No. 29063); ten copies have been filed with the Clerk of this Court.

which to acquire jet equipment. The possible sources of such financing were severely limited. Lending institutions from whom such financing was available, including Metropolitan Life Insurance Company ("Metropolitan"), The Equitable Life Assurance Society of the United States ("Equitable") and certain banking institutions, demanded as a condition to supplying the needed financing—presumably as additional assurance for the repayment of their loans—that Toolco place its entire stock interest in TWA in a voting trust which these lenders would control so long as they held the notes of TWA.

In order to insure that needed jet equipment would be acquired by TWA and because of the difficulty, if not impossibility, of TWA's obtaining the necessary financing elsewhere, Toolco was compelled to yield to the demand of the lenders. Toolco did so, however, only upon the lending institutions granting to it the right and option to acquire the TWA notes (conditioned, in the case of the loans made by Metropolitan and Equitable, upon a prepayment penalty set initially at 22%), and thereby to terminate the Voting Trust.

In December 1960, pursuant to the jurisdiction over Toolco-TWA transactions which the CAB had retained in its order approving Toolco control, the CAB approved certain transactions between Toolco and TWA involving the acquisition of jet aircraft by TWA from Toolco and financial assistance to be given by Toolco in connection therewith; and also approved under Section 409 of the Act certain interlocking relationships arising from the creation of the Voting Trust. *Trans World Air, Control by Hughes,* 32

C.A.B. 1363 (A-191). The CAB did not, however, attempt to exercise any jurisdiction over the agreement between Toolco and the lending institutions (to which TWA is not a party) which granted Toolco the option to acquire the TWA notes; did not hold a hearing; and did not approve the acquisition of control of TWA by the lending institutions. The CAB in dictum remarked that it would anticipate the proper filing of an application under Section 408 of the Act* and the obtaining of CAB approval before Toolco attempted to resume the exercise of control over TWA. But the dictum does not mention any requirement of a public hearing prior to the resumption of the exercise of control and does not purport to modify or revoke the 1944 and 1950 orders approving Toolco's control over TWA.

Within a few months after the Voting Trust was established, the TWA management, which had been installed by the voting trustees appointed by the

---

* The December 1960 order of the CAB (A-191) was misconstrued in the decision of the Court of Appeals. The opinion of the Court (339 F.2d at 62; page 21a) ascribes to the CAB the statement that "it [the CAB] anticipated a Section 408(b) application and hearing 'before Toolco would attempt to reassume control over TWA.'" In fact what the CAB said was that "it would anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA." (A-198). The CAB, on the filing of an application under Section 408 of the Act, has consistently approved, pursuant to its retained jurisdiction, transactions between Toolco and TWA without a hearing. The acquisition of the TWA notes might well be construed as being in effect such a transaction. Accordingly, there is no basis for equating the mention, in the December 1960 order, of the filing of an application under Section 408 and the obtaining of the approval of the CAB with the statutory requirement of a full evidentiary hearing under Section 408(b) of the Act prior to an acquisition of control of an air carrier within the meaning of Section 408(a) of the Act.

lending institutions, brought an antitrust action against Toolco seeking money damages and an order requiring Toolco to divest itself permanently of its TWA stock. The new lender management of TWA then proceeded to enter into an agreement with Pan American World Airways, Inc. for the purpose of merging the operations of TWA into those of Pan American and submitted an application for approval of this merger to the CAB. Thereupon, in February 1963, Toolco filed a complaint with the CAB, charging a conspiracy to obtain control of TWA. The complaint sought termination of the Voting Trust on the ground that Metropolitan and Equitable had acquired and were maintaining control of TWA in violation of Section 408 of the Act, since their acquisition of control over TWA through the Voting Trust had never been approved by the CAB. Toolco also complained of interlocking relationships never approved by the CAB and in violation of Section 409 of the Act, in that three of the directors of Pan American are also directors of Metropolitan. The Bureau of Enforcement of the CAB recommended to the CAB that an investigation be instituted, stating that "... there are reasonable grounds to believe that certain provisions of the Act and requirements thereunder have been violated ..." (Petition for Enforcement, p. 3, CAB Docket No. 14314, April 8, 1963). The matter is presently pending before the CAB.

In 1964, Toolco decided to exercise its contractual right to purchase the TWA notes from the lending institutions and thus terminate the Voting Trust. The agreement between Toolco and the lending institutions requires that the notice of the exercise of Toolco's option be accompanied by an opinion of

counsel that the purchase of the notes does not require any governmental or regulatory approval, or that such approval has been granted and is in full force and effect (A-5). Therefore, on April 29, 1964, Toolco filed with the CAB a motion (A-3) requesting that the CAB disclaim jurisdiction over the exercise by Toolco of its option or approve such exercise, pursuant to its retained jurisdiction over TWA-Toolco transactions. The lending institutions did not file any answer to this motion. TWA, however, under the management installed by the lending institutions, opposed Toolco's motion (A-10, A-75), claiming, *inter alia*, that a termination of the Voting Trust would constitute a new acquisition of control under Section 408(a) of the Act requiring a statutory hearing under Section 408(b) of the Act.

Thus, the issue presented to the CAB was whether the resumption of the exercise of control by Toolco upon termination of a voting trust would constitute an acquisition of control independent of that previously approved by the CAB. The issue arose in a factual setting in which (i) Toolco's acquisition of its stock interest had been approved by the CAB, (ii) Toolco had never parted with its ownership of this stock interest or with the right to resume the exercise of control upon exercise of the option granted to it by the lending institutions, (iii) there was reason to believe that lender-control through the Voting Trust had been created and was being maintained in violation of the Act, (iv) the orders of the CAB approving Toolco's control through its stock interest in TWA were in full force and effect and had never been modified, revoked or suspended, and (v) TWA had never invoked the processes of the CAB, pursuant to its

rules, to seek a modification or termination of these prior orders.

On these undisputed facts, the CAB on July 10, 1964 entered an order (page 1a) stating that the exercise by Toolco of its contractual rights, and the consequent termination of the Voting Trust, would not constitute a new acquisition of control by Toolco over TWA within the meaning of Section 408(a) of the Act.*

The CAB found that the Voting Trust had been insisted upon by the lending institutions in connection with their supplying financing to TWA; that the Voting Trust represented only a delegation by Toolco of its voting rights for a limited period of time; and that Toolco had never parted with its beneficial interest in the stock, the acquisition of which the CAB had approved. The CAB held that the approval of Toolco's control granted in its 1944 and 1950 orders remained in full force and effect and that no statutory objective would be vindicated by requiring a new approval, after a public hearing, of that which had already been approved.**

* The CAB's order was conditioned on Toolco's divesting itself of control of Northeast Airlines, Inc. or submitting a satisfactory plan for such divestiture to the Board. (See pages 8a, 9a).

** The CAB stated that the dictum in its December 1960 order —indicating that it would anticipate the filing of an application under Section 408 before Toolco attempted to resume control of TWA—had been uttered when the jurisdictional issue was not before it and without its having the benefit of a full briefing on the matter; accordingly, it did not regard its prior statement as controlling. (See page 8a, n. 10). Moreover, it should be noted that the December 1960 order was entered on the *ex parte* application of TWA, without any participation by Toolco therein, and without any notice to Toolco that its contractual rights under its agreement with the lending institutions might be affected in any way by the order.

On Petition of TWA, the Court of Appeals vacated the CAB's determination that Toolco could acquire the TWA notes from the lending institutions and terminate the Voting Trust, and remanded the case to the Board for action not inconsistent with the decision of the Court. The Court of Appeals held "that the Board should have held a hearing before issuing its order permitting Toolco to resume control of TWA and that the declaratory ruling was an abuse of the Board's discretionary power" (339 F.2d at 62; page 22a), stating that Section 408(b) of the Act requires a hearing to determine whether the acquisition of control of an airline is in the public interest, that the charges in the antitrust complaint filed by TWA against Toolco "present a picture which is entirely inconsistent with the requirements of the public interest" (339 F.2d at 62; page 22a), and that "in view of the notice which the Board had of changes in the situation during the period since 1950 it could not properly rely on its 1950 order in granting permission to Toolco to resume control of TWA." (339 F.2d at 63; page 23a).

Reasons for Granting the Writ

I.

The decision of the Court of Appeals presents fundamental questions as to whether a reviewing Court may either substitute its judgment for that of the CAB or assume duties and responsibilities entrusted to the CAB with respect to matters central to the regulatory scheme of the Act, calling for administrative expertise, constantly recurring in their

nature, and always heretofore determined by the CAB after a consideration of the facts and circumstances of a particular case. Although the rationale of the decision of the Court of Appeals is obscure at best—and the Court of Appeals denied Petitions for Rehearing requesting clarification—the consequences of its decision in four important areas are clear:

A. A determination of the CAB that no new acquisition of control would occur upon termination of the Voting Trust has been set aside, without discussion of the reasons given by the CAB for its determination and even though the determination has a rational basis in law and fact;

B. The effectiveness of orders of the CAB approving an acquisition of control has been terminated notwithstanding that (i) such orders were not before the Court for review, (ii) no party had sought a termination of the orders, and (iii) the CAB has never considered whether such orders should be terminated. As a result, control of TWA by the lending institutions has been continued even though there is reason to believe such unapproved control violates the Act, and the exercise of control over TWA by its majority owner, whose acquisition of control was approved by the CAB, is prevented;

C. The separation of control of TWA from ownership is continued for an indefinite period with possible serious adverse consequences to the thousands of minority stockholders of TWA, the market value of whose investment in TWA exceeds $100 million; and

D. The CAB is required to hold a hearing, presumably because of the unproven charges of an antitrust complaint, even though whether such charges would warrant a hearing is a question committed to agency discretion and the CAB has never been called upon to exercise and has not exercised its discretion in the matter.

Review by this Court is warranted by (i) the interference with the integrity of the administrative process and with the ability of the CAB to regulate the air transportation industry which is inherent in the decision of the Court of Appeals, (ii) the departure from the standards of judicial review established by decisions of this Court and followed in other circuits, and (iii) the importance of the questions presented to the air transportation industry.

A.

The issue on Toolco's motion to the CAB, and the only question decided by the CAB,* was whether the exercise by Toolco of its contractual right to purchase the TWA notes and thereupon to resume the exercise of control over TWA required CAB approval after a statutory hearing pursuant to Section 408(b) of the Act. Whether such approval was required depended in turn upon whether the resumption of the exercise of control, after a temporary hiatus occasioned by the Voting Trust, would constitute an acquisition of control within the meaning of Section

* In this discussion it is assumed that all issues relating to the simultaneous exercise of control over TWA and Northeast were not present before the CAB because such issues are irrelevant to the decision of the Court of Appeals.

408(a) of the Act separate from that theretofore approved by the CAB.

The determination of the CAB that no new acquisition of control within the meaning of Section 408(a) would occur upon the termination of the Voting Trust unquestionably has a rational basis in law and fact. Toolco has never parted with the ownership of its controlling stock interest in TWA nor with the power to vote its stock upon compliance with the terms of its agreement with the lending institutions. Rather it has permitted, pursuant to a right given to it by Delaware law, voting trustees to exercise for a limited time the voting rights of which it remains the beneficial owner.

The CAB has repeatedly recognized that the creation of a voting trust does not insulate one engaged in a phase of aeronautics from the requirement of obtaining CAB approval where a control relationship would otherwise exist. By the same token a control relationship does not terminate because stock is placed in a voting trust. See, *e.g., National Airlines—Lewis B. Maytag, Jr.,* Order E-20701 (April 15, 1964); *Allegheny Airlines, Inc., Enforcement Proceeding,* Order E-20336 (Jan. 6, 1964); *Pan American-National Agreement Investigation,* 31 C.A.B. 198 (1960); *Indiana-Ohio Local Service Case,* 16 C.A.B. 880, 889-90 (1953); *cf. Toolco-Northeast Control Case,* Order E-21940 (March 23, 1965); *Seaboard & Western Airlines, Agreements,* 32 C.A.B. 1322 (1960).

The only legitimate purpose served by the Voting Trust is to assure repayment of the loans to TWA made by the institutions which insisted upon the

creation of the Voting Trust as a condition to making such loans. Surely Section 408 of the Act was not intended to inhibit a controlling stockholder from assisting an air carrier in obtaining necessary financing from lending institutions. The CAB correctly concluded that no statutory objective is furthered by requiring new CAB approval after a protracted hearing because the interest of the lending institutions in protecting their loans has terminated.

By disregarding the basis given by the CAB for its decision and by vacating the determination of the CAB even though it unquestionably had a rational basis in fact and law, the Court of Appeals departed from the accepted standards of judicial review. The result it reached is in direct conflict with the rationale of the decisions of this Court in *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125 (1939) and *Allehgany Corp.* v. *Breswick & Co.,* 353 U.S. 151 (1957). In the latter case this Court specifically held that a determination of the Interstate Commerce Commission as to what constitutes an acquisition of control must be upheld if a rational basis exists for the agency determination.

The result reached by the Court of Appeals for the Second Circuit is also in conflict with the standards for judicial review employed in other circuits. See, *e.g., American Airlines* v. *CAB,* 231 F.2d 483 (D.C. Cir. 1956); *Ferenz* v. *Folsom,* 237 F.2d 46 (3d Cir. 1956), *cert. denied,* 352 U.S. 1006 (1957); *American Airlines* v. *CAB,* 178 F.2d 903 (7th Cir. 1949); *Trans-Pacific Freight Conf.* v. *Federal Maritime Comm'n,* 314 F.2d 928 (9th Cir. 1963).

What is an acquisition of control is not subject to precise definition and does not lend itself to judicial determination. For example, the creation of a debtor-creditor relationship would not normally be thought to constitute an acquisition of control. Yet, as the CAB has recognized, in certain situations the existence of such a relationship would result in a control relationship. *Transocean-Atlas Case, Control & Interlocking Relationships*, 29 C.A.B. 622 (1959); *cf. Toolco-Northeast Control Case*, Order E-21940 (March 23, 1965); *Seaboard & Western Airlines, Agreements*, 32 C.A.B. 1322, 1327 (1960); *Meteor-Metropolitan Aircraft Sale & Leaseback Proceeding*, 26 C.A.B. 596 (1958). Similarly, as the CAB has recognized, the effect of the creation of a voting trust on what would otherwise constitute a control relationship can only be determined after a consideration of all relevant circumstances. See *National Airlines —Lewis B. Maytag, Jr., supra.* Certainly an administrative agency by reason of its knowledge of the industry and the probable effect of given transactions upon the air carrier and air transportation is better equipped to make the required determination than a reviewing court and must be granted wide flexibility in making such a determination.

The departure by the Court of Appeals from accepted standards of judicial review may not be dismissed as an aberration arising from a peculiar factual situation, which, whatever its impact upon Toolco, has no particular significance generally. To the contrary:

(1) The decision of the Court of Appeals casts doubt upon a long line of decisions of the CAB that what is an acquisition of control is to be

determined on the facts of the particular case, interpreted according to the standards of the Act and the policies enunciated by the CAB, requiring the exercise of administrative judgment rather than the application of predetermined legal principles. See, *e.g., Transocean-Atlas Case, Control and Interlocking Relationships,* 29 C.A.B. 622, 643 (1959), and cases discussed therein. For a reviewing court to substitute its judgment for that of the CAB in this important area disregards administrative expertise and impairs the ability of the CAB to determine matters entrusted to it by Congress, according to its view of what is calculated to promote the development of air transportation and its other statutory objectives.

(2) The question determined by the CAB was one going to the heart of its duties and responsibilities under the Act. Both the provisions of the Act and its legislative history reflect the Congressional purpose that the CAB and not the courts should determine when and under what circumstances a given relationship should be permitted between a person engaged in a phase of aeronautics and an air carrier.* Whether a given transaction constitutes an acquisition of control (or a divestiture of control) affects the jurisdiction of the CAB to subject such a relationship to regulation and is thus central to the regulatory scheme of the Act.

---

* Allen, *Section 408 of the Federal Aviation Act: A Study in Agency Law-Making,* 45 Va.L.Rev. 1073 (1959); Hale & Hale, *Competition or Control IV: Air Carriers,* 109 U.Pa.L.Rev. 311, 338-39 (1961); Rhyne, *Civil Aeronautics Act Annotated* 41-65, 189-220 (1939).

(3) The question presented by Toolco's motion is one recurring in its nature. Perhaps no question under Section 408 of the Act has arisen as frequently in recent years as that of the effect of a voting trust upon what would otherwise constitute a control relationship requiring CAB approval.* In light of the prevalence of voting trusts to serve a variety of purposes, the consequences under the Act of their termination is also a question likely to recur with increasing frequency.

(4) The effect of the decision of the Court of Appeals, which sets aside a rational determination of the CAB without providing any standard to take its place, is to inhibit a variety of financial transactions for the benefit of air carriers. Under the decision of the Court of Appeals any financing arrangement which provides that a controlling stockholder shall permit control to be exercised in whole or in part by others during the period of the loan, such as a pledge of the shares coupled with a proxy, would appear to require a protracted hearing prior to termination of the arrangement. The CAB stated to the Court of Appeals, in its Petition for Rehearing, that it is not unusual for a lender to require a voice in management as a condition to making a loan to an air carrier and indicated that a controlling stockholder could not be expected to enter into such an arrangement if the conse-

---

* In addition to the present case and the cases cited at page 13, *supra*, see *Hughes-TWA-Atlas-Northeast Possible Common Control Case*, 27 C.A.B. 155 (1958); *Meteor-Metropolitan Aircraft Sale & Leaseback Proceeding*, 26 C.A.B. 596 (1958).

quences are that the stockholder may be subjected to a second burdensome and lengthy statutory hearing under Section 408(b) on an issue determined in his favor at the time he acquired his controlling interest (R. 460; page 33a). Indeed, under the decision of the Court of Appeals he could not even rely upon an advisory opinion or other assurances from the CAB that he might resume control in accordance with the bargain made with the lenders, since the courts would be free to make a *de novo* determination at the time he sought to resume control.

(5) If the resumption of the exercise of control after a temporary hiatus occasioned by the creation of a voting trust may require new Board approval under Section 408, then such ordinary corporate practices as the granting of proxies or a temporary hiatus in the exercise of control arising from an assignment for the benefit of creditors or voluntary reorganization under the Bankruptcy Act may also result in a requirement of a new CAB approval after a public hearing. Clearly, however, to require a second hearing in such circumstances would vindicate no statutory objective. Nevertheless, in the absence of effective guidelines—which are not provided by the opinion of the Court of Appeals and which, in any event, would appear to be within the province of the CAB to establish—confusion and uncertainty are created.

B.

When and under what circumstances a Court of Appeals may terminate orders of the CAB approving an acquisition of control is a question which affects every person who has obtained such an order. It would appear from the decision of the Court of Appeals that a court may effectively terminate an approval order whenever it is of the view that there has been a change of circumstances affecting the public interest determination made by the CAB, even though the petitioning party has never sought from the CAB, pursuant to its established procedures, the modification or revocation of said order.

The Court of Appeals stated that the CAB was precluded from relying on its prior approval orders because TWA had filed an antitrust complaint against Toolco. But whether the prior orders of the CAB should be modified or revoked because of the charges in TWA's antitrust complaint was a question which was not before the CAB on Toolco's motion. What is an acquisition of control within the meaning of Section 408(a) of the Act does not depend upon who is suing whom or on what grounds.

Moreover, the CAB expressly stated in its brief to the Court of Appeals that it would reexamine whether Toolco control over TWA continues to be in the public interest if TWA filed a complaint before it which set forth facts justifying a reopening of the question and that it was not even determining whether it would not itself reconsider the issue. However, even after such an invitation, TWA has not requested a modifi-

cation or termination of the approval orders of the CAB. Indeed, TWA has sedulously avoided making any charges against Toolco before the one forum with extensive knowledge of the Toolco-TWA relationship and with the unquestioned authority to terminate Toolco's control.

The action of the Court of Appeals terminating the effectiveness of CAB orders not before it represents a clear interference with the administrative process. Moreover, the decision of the Court of Appeals, by precluding the exercise of control by Toolco over TWA for an indefinite period, even though the acquisition of such control was approved by the CAB, permits the continued control of TWA by the lending institutions. Apparently, the Court of Appeals, in directing a third public hearing as a prerequisite to Toolco's resuming the exercise of its rights as majority stockholder, was quite willing to continue lender control which has never been subject to any hearing. Such control has, however, not only *not* been approved by the CAB but its Bureau of Enforcement has found that there is reason to believe that such control was acquired and is being maintained in violation of the Act. Thus, the Court of Appeals has imposed upon the CAB its view that it is more consistent with the public interest for the lending institutions to continue in control of TWA, even if that control is in violation of the Act, than for Toolco to resume exercise of the control which the CAB approved.

Congress has entrusted to the CAB, and not to the courts, the function of determining that a particular

control relationship is or is not in the public interest. Such a determination requires a detailed knowledge of the facts and an expertise with respect to the regulated industry, which the CAB has, but which the courts do not have. If a court may determine the public interest, *ab initio,* and impose that determination upon an administrative agency, then the administrative process is a nullity.

C.

The decision of the Court of Appeals not only deprives Toolco of its contractual right to exercise control over TWA without Toolco's being afforded any hearing whatsoever as to whether the prior orders approving its control should be modified or revoked, but also continues for an indefinite period the present separation of control from ownership at TWA with possible serious adverse consequences to the thousands of minority stockholders of TWA.

These possible consequences are graphically illustrated by the merger with Pan American proposed by the present management of TWA. This merger may have been abandoned but the fact that such a merger was suggested shows what may happen when those with the power to vote a majority of the stock have no economic interest in the airline. The community of interest which generally exists between majority and minority stockholders and works for the protection of all stockholders does not exist where voting rights to a majority of the stock are vested in those who have no economic interest as stockholders and possibly adverse interest as lenders.

At this time decisions are being made by the present management of TWA involving the purchase of hundreds of millions of dollars in flight equipment. Such capital expenditures necessarily involve huge financing requirements, and vitally affect the interests of the owners of TWA. The owners are, however, powerless to express effectively their views and to protect their interests. They must look for such protection to those who, whatever their good intent, have been selected by lending institutions to protect an interest which by its very nature conflicts frequently with that of the airline and all its stockholders. It was, however, to prevent exactly such actual or potential conflicts of interest that Section 408 of the Act was enacted. See, *e.g., Lehman Brothers Interlocking Relationships Case*, 15 C.A.B. 656, 673-74 (1952), *aff'd sub nom. Lehman* v. *CAB*, 209 F.2d 289 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 916 (1954).

D.

Not only did the Court of Appeals arbitrarily terminate orders of the CAB which were not before it, but it found an abuse of discretion where no discretion had been either invoked or exercised. Had the CAB determined that the exercise of Toolco's option would represent an acquisition of control under Section 408(a) of the Act, a hearing would have been mandatory under Section 408(b), and the CAB would have had no discretion in the matter. When the CAB determined that the exercise of Toolco's option would involve no new acquisition of control, at least two courses were, and still are, available to TWA, under the rules of the CAB, to secure a hearing on the fitness of Toolco to continue to control TWA: (i) to seek

modification or revocation of the CAB's prior orders approving Toolco's control; or (ii) to file a complaint alleging facts with respect to Toolco's past conduct. As heretofore stated, TWA has never availed itself of the processes of the CAB to seek a modification or revocation of the prior orders of the CAB. Neither has it filed with the CAB a complaint or other appropriate pleading as provided by the rules of the CAB.

The CAB has established the manner in which such complaints shall be processed and for determining, in the exercise of its discretion and subject to judicial review, whether a hearing is required on the complaint. See 14 C.F.R. § 302.200 *et seq.* For a reviewing court to disregard the procedures established by the CAB threatens the ability of the CAB to be master of its own house and prejudges how the CAB might determine a matter committed to its discretion by statute.

Yet this is precisely what the Court of Appeals has done. It has introduced a novel procedure for invoking administrative action: the filing of a private suit in a federal district court. For it is the charges in the antitrust complaint filed by TWA against Toolco which the court cites as presenting "a picture which is entirely inconsistent with the requirements of the public interest" (339 F.2d at 62; page 22a), and which apparently constitute "the notice which the Board had of changes in the situation during the period since 1950" (339 F.2d at 63; page 23a). Clearly, however, there was no basis in the record before the Court of Appeals which would warrant its dictating how the CAB should exercise its discretion in a matter never considered by it.

Although the Court of Appeals based its determination upon the charges contained in TWA's antitrust complaint, such charges have never been the subject of a hearing on the merits. TWA has never contended in the antitrust litigation that Toolco has violated the Act or any CAB order. Furthermore, the same Court of Appeals has held that the federal courts and not the CAB have jurisdiction over TWA's complaint.

The Court of Appeals apparently assumed the allegations of TWA's complaint to be true, and, on that basis, in effect found Toolco not fit to control an air carrier. The CAB, however, does not formulate its view of the public interest on the basis of the unproven allegations of a complaint. It has available detailed information gathered over all the years of the Toolco-TWA relationship. As the CAB pointed out to the Court of Appeals in its Petition for Rehearing, the Board "maintains continuing surveillance over the airlines, and it has a great deal of information in its public files concerning the day-to-day operations of the carriers, and the decisions and actions of their management. . . . *Thus, the matters alleged in the antitrust complaint were the subject of staff inquiry in relation to the Board's approval of control of Northeast by Toolco, and, as noted by the Court of Appeals of the District of Columbia Circuit, no evidence was adduced in the Board's proceeding showing any illegal action by Toolco in connection with its control of TWA notwithstanding that any person* [including the lender-controlled managment of TWA] *was at liberty to attempt such a showing. . . .*" (R. 459; pages 31a-32a; footnote omitted; emphasis added).

In such circumstances, it is plainly an improper interference with the administrative process warranting review by this Court for a Court of Appeals to prejudge how the CAB should exercise its discretion and, without either expert knowledge or a hearing record before it, to impose its views upon the CAB by judicial fiat.

Although TWA's Petition for Review of the CAB's order placed great weight upon the contention that to permit Toolco again to exercise its rights as a stockholder might permit it to frustrate the prosecution of TWA's antitrust action (R. 259), the existence of this private action is no basis for arbitrary action by the Court of Appeals. Indeed, TWA's repeated emphasis of this point, coupled with the reliance of the Court of Appeals on the existence of the antitrust action as a justification for overturning the CAB's order, and its intemperate comments on Toolco's supposed motives and conduct in its prior decision reviewing certain aspects of that litigation (*Trans World Airlines, Inc.* v. *Hughes,* 332 F.2d 602, 615 (2d Cir. 1964)), suggest that the court's reversal of the CAB determination represents in effect a sanction imposed on Toolco by reason of its conduct in the antitrust action, additional to the extraordinary sanctions already imposed therein.

However, for a reviewing court to dictate how the agency must exercise its discretion because of the court's view of events in a private action, would be an arbitrary use of judicial review for purposes unrelated to any proper function of the reviewing court. Moreover, such a distortion of the purposes of judicial review and such an extension by a reviewing

court of its jurisdiction in order to accomplish objectives unrelated to the determination made by the agency, would be such a departure from the accepted and usual course of judicial proceedings as plainly to call for an exercise of this Court's power of supervision over the federal courts.

II.

An important and novel question is presented as to whether the decision of the Court of Appeals is an improper interference with Toolco's contractual rights and an improper exercise of jurisdiction.

TWA as a stranger to the contract between Toolco and the lending institutions was not affected by the advisory opinion of the CAB. The decision does not impose an obligation on TWA, denies no right to TWA and does not fix any legal relationship of TWA as a consummation of the administrative process, and is thus not reviewable on petition of TWA. See, *e.g., Chicago & So. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112-13 (1948); *cf. California Oregon Power Co.* v. *FPC*, 239 F.2d 426 (D.C. Cir. 1956). Moreover, since TWA would appear to have no "substantial interest" in and to be in any way "aggrieved" by said order, it would appear to have lacked standing to seek review.* *Cf. FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618-19 (1944).

---

* Section 1006(a) of the Act, 49 U.S.C. § 1486(a) provides that an order of the Board may be reviewed only by a person "disclosing a substantial interest in such order." Similarly, Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 1009(a), limits those entitled to review an administrative order to persons "suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute . . . ."

The only possible claim of interest on the part of TWA is that the order of the CAB in some way precluded it from showing that Toolco's control of an airline is not in the public interest. But the order of the CAB did not purport to pass upon this question and TWA has been free at all times to invoke the processes of the CAB to determine whether Toolco's control continues to be in the public interest. Since it has not done so, TWA may not be heard to complain that the order obtained by Toolco, to satisfy the conditions of a contract between Toolco and the lending institutions, denied TWA a hearing as to whether Toolco's control is in the public interest.

Conclusion

The writ should be granted by reason of (i) the interference with the administrative process inherent in the decision of the Court of Appeals, (ii) the departure by the Court of Appeals from accepted standards of judicial review, and (iii) the importance

of the questions presented to the air transportation industry.

Respectfully submitted,

CHESTER C. DAVIS
120 Broadway
New York, New York 10005
Attorney for Petitioner

Of Counsel:

CLIFFORD & MILLER
815 Connecticut Avenue, N.W.
Washington, D.C. 20036

ANDREWS, KURTH, CAMPBELL & JONES
25th Floor, Humble Building
Houston, Texas 77002

May 19, 1965.

APPENDIX

APPENDIX "A"

Order No. E-21057

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 10th day of July, 1964

Docket 1182

In the Matter of the Application of

HUGHES TOOL COMPANY

for approval under section 408 of the Federal Aviation Act of 1958, as amended, of the acquisition of control of

TRANS WORLD AIRLINES, INC.

ORDER

On April 30, 1964, the Hughes Tool Company (Toolco) filed a motion seeking a disclaimer of jurisdiction over the acquisition by Toolco from Metropolitan Life Insurance Company and the Equitable Life Assurance Society of $92,800,000 principal amount of outstanding Series A Sinking Fund Notes (Notes) of TWA. In the alternative, Toolco requests modification of Order 3210, or entry of an order under section 408 of the Federal Aviation Act of 1958, as amended (Act), so as to authorize the proposed ac-

quisition without hearing. The transaction which is the subject of the Toolco motion would permit Toolco to regain legal ownership of its 78 per cent controlling shares of stock of Trans World Airlines, Inc., now being held in a voting trust.

An answer in opposition to the Toolco motion was filed by TWA to which Toolco filed a reply. Toolco's reply was the subject of a second pleading by TWA, styled a reply. In addition, National Airlines, Inc. and Eastern Air Lines, Inc. filed answers seeking denial of Toolco's motion, and also filed petitions for leave to intervene. Toolco filed an answer opposing the petitions for leave to intervene, and National subsequently sought leave to file a reply to that answer.[1]

The matter of Toolco's relationships with TWA has been before the Board on various occasions in the past. In 1944, ownership by Toolco of 46 per cent of the stock of TWA was approved by the Board.[2] Thereafter Toolco increased its holdings in TWA, and in 1950, the Board approved Toolco's ownership of 73 per cent of TWA's stock.[3] In 1960, TWA found it necessary to raise substantial amounts of capital to support a reequipment program. This financing included loans from Metropolitan and Equitable represented by the Notes in question. As a condition to

---

[1] We shall grant these requests to file responsive pleadings. However, in view of the action we shall take herein, and since our Rules of Practice do not contemplate formal intervention procedures in nonhearing matters, the Eastern and National petitions to intervene will be dismissed.

[2] 6 C.A.B. 153 (1944).

[3] *TWA—Further control by Hughes Tool Company*, 12 C.A.B. 192 (1950).

extending these loans, the lenders required Toolco to place all of its TWA stock in a voting trust.[4] This voting trust was to remain in effect for ten years, but provision was made for an earlier termination in the event, *inter alia,* that Toolco exercised an option to purchase from Metropolitan and Equitable the outstanding Notes of TWA. Since the establishment of the voting trust, the voting trustees have exercised the voting rights of the majority shares of TWA and Toolco's participation has been limited to the designation of one of the three voting trustees and one of the directors on TWA's board.

Toolco now desires to exercise its option to acquire the outstanding Notes of TWA held by Metropolitan and Equitable. Acquisition of the Notes would enable Toolco to terminate the voting trust and resume full control as majority shareholder of TWA. The basic legal question presented is whether or not Board approval is required as a condition to this resumption of control. As set forth more fully below, section 408 prohibits acquisition of control of air carriers, under certain circumstances, without prior Board approval after notice and public hearing. Taking the position that the Board has no jurisdiction over the resumption of control under the circumstances here present, Toolco has filed a petition for disclaimer of jurisdiction or, in the alternative, for an order of approval.

Toolco argues that the Board previously approved the quantum of control over TWA which Toolco seeks to resume; that the previous Board approval remains

---

[4] For details of the transactions, see Order E-16195, adopted December 29, 1960.

effective and did not lapse during the period the voting trust prevented full exercise of the approved control; that the *National Case* (Order E-20701, April 15, 1964) establishes that a voting trust does not foreclose finding that the beneficiary retains control nor does such a trust deprive the Board of its jurisdiction; that the voting trust of Toolco's TWA shares may be terminated by the institutional investors without any action by Toolco or Board approval therefor; that it would be inequitable to place Toolco's rights under a greater disability; and, finally, that Toolco should not be prevented from regaining its stock rights which were taken from it "under duress."

TWA argues Toolco may not reacquire control of TWA except under the hearing requirements of section 408; that the *National Case* gives no support to Toolco's position; and that it was Toolco's own actions, not duress, which resulted in the creation of the voting trust.

Eastern and National argue that the Board recognized in the *Toolco-Northeast Control Case* that, if Toolco terminated the TWA voting Trust, a hearing in the issue of joint control of two air carriers would be required under section 408; that Order E-16195, December 29, 1960, stated that if Toolco sought to terminate the voting trust, an application under section 408 and a "searching inquiry" by the Board would be necessary; that an increase of control would result from a resumption of full control of TWA by Toolco, calling for a public hearing pursuant to section 408 under the rule of the *TWA Further Control by Toolco Case;* and, finally, that joint control of TWA and

Northeast would stifle the competition now existing between these carriers.

A determination of the jurisdictional question first requires consideration of the provision in section 408(a)(5) which makes it unlawful, unless approved by the Board after public hearing, "for any . . . person controlling an air carrier . . . to acquire control of any [other] air carrier in any manner whatsoever." In addition to its interest in TWA, Toolco controls another air carrier—Northeast Airlines. This control, approved by the Board in 1962, was acquired after Toolco placed its TWA stock in the voting trust.[5] In approving the control of Northeast, the Board was concerned solely with the question as to whether Toolco, as a person engaged in a phase of aeronautics, should be permitted to control Northeast. The Board did not consider it necessary to pass upon the question of any possible common control of Northeast and TWA by Toolco in view of the fact that Toolco's controlling stock interest had been made subject to the voting trust. The Board specifically stated that "Our findings here are limited to the control relationship presented by the Purchase Agreement that is before us. We have not considered nor do we pass upon . . . any public interest issues that may arise in connection with any future resumption of Toolco control of TWA."[6] Indeed, the absence of a ruling upon the alleged common control was challenged on judicial review, and the Board represented in its brief to the Court of Appeals that the issue of common control

---

[5] *Toolco-Northeast Control Case,* Order E-18470, June 19, 1962.

[6] *Ibid.* at 11.

would be considered at such time as Toolco resumed full control of TWA. The Court upheld the Board's approval of the Toolco-Northeast control relationship.[7]

It is apparent from the foregoing that the Board has never approved common control of TWA and Northeast by Toolco, and that it specifically reserved this question for future consideration in the event of the termination of the voting trust. Since, under section 408, approval by the Board after hearing is a necessary predicate to the common control of two air carriers by one person and since such approval has never been granted by the Board, it follows that Toolco could not lawfully resume control of TWA while at the same time maintaining its control of Northeast unless it obtains prior Board approval under section 408 after hearing. Accordingly, under existing circumstances, we must deny Toolco's application for a disclaimer of jurisdiction or for an order of approval without hearing.

The question remains whether, in the absence of common control, the resumption of full managerial control by Toolco of TWA, following the termination of the voting trust, would in itself require Board approval after hearing under section 408 as an acquisition of control of a carrier by a person engaged in a phase of aeronautics.[8] Since this question has

---

[7] *National Airlines* v. *C.A.B.*, 321 F. 2d 380 (C.A.D.C., 1963).

[8] Section 408(a)(5) prohibits "any person engaged in any other phase of aeronautics . . . to acquire control of any air carrier in any manner whatsoever." Toolco has for many years engaged in various aeronautical activities, and it is not disputed that it is engaged in a "phase of aeronautics" within the meaning of section 408.

been thoroughly briefed, and in view of the importance of terminating the controversy between the parties on this subject and removing uncertainty as to the application of section 408 to the peculiar facts involved, we find it appropriate to issue a declaratory ruling on the question.

As previously indicated, the Board in 1950 approved, under section 408, Toolco's ownership of 73 per cent of the stock of TWA.[9] The question presented is whether or not this approval terminated as a result of the voting trust which prevented full exercise of the approved control. We conclude that our earlier approval did not so terminate and that resumption of full control by Toolco under its option to purchase the Notes would not result in an independent acquisition of control subject to the hearing and approval requirements of section 408.

In our view of the matter, we need not reach the issue as to whether the voting trust effected a complete insulation of Toolco's control over TWA within the meaning of section 408. Even if we assumed that Toolco temporarily lost all power to control TWA during the period of the voting trust, this fact would not have effected a termination of the Board's prior approval of the Toolco control of TWA under the unique circumstances present here. In our judgment, there was involved at most a temporary hiatus in control imposed upon Toolco by the exigencies of TWA's financing requirements. Toolco at all times has retained the beneficial ownership of the stock in ques-

---

[9] *Trans World Airlines, Inc. Further Control by Hughes Tool Company, supra.*

tion. The trust itself is for a temporary period of ten years and is terminable prior to the end of that period upon the discharge of TWA's indebtedness to the financial institutions. We find nothing in either the literal language of section 408 or its underlying policy that would require that Toolco be subjected to a second hearing on the very issue which was previously heard and decided by the Board. A contrary reading of the statute would result in harassment of Toolco without vindicating any statutory objectives.[10]

Accordingly, absent control of another air carrier, and upon prior approval of the Board, Toolco would be free to resume full control of TWA without any further hearing. Questions under section 408 may arise in the event that Toolco should decide to insulate itself from control of Northeast, TWA, or both, while retaining interests in both carriers as stockholder, creditor, or otherwise. Therefore, any arrangements which are intended by Toolco to divest itself of control of either carrier, should be submitted to the Board in advance of their implementation for determination as to whether prior approval is required under section 408.

ACCORDINGLY, IT IS ORDERED THAT:

1. The motion of Toolco for a disclaimer of juris-

[10] We recognize that in our order dealing with the voting trust (Order E-16195, December 29, 1960) the Board indicated, by way of dictum, that it would anticipate the filing of an application under section 408 before Toolco attempted to reassume control of TWA. However, the jurisdictional issue was not before us in that case, nor did we have the benefit of a full briefing of the matter. Accordingly, we do not regard these prior statements as controlling on us here.

diction under section 408 of the Act or for an order of the Board so as to permit the acquisition of control described herein be and it hereby is denied;

2. It is hereby declared that Toolco may exercise its option to acquire the TWA Notes described herein at such time as it submits a plan satisfactory to the Board which would effectively divest Toolco of the power to simultaneously control both TWA and Northeast;

3. The motion of Toolco to file a reply and of TWA to file a reply to such reply be and they hereby are granted;

4. The petitions of Eastern and National for leave to intervene be and they hereby are dismissed; and

5. Toolco's motion, except to the extent granted herein, be and it hereby is denied.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 138—September Term, 1964.

(Argued September 25, 1964
Decided December 7, 1964.)

Docket No. 29063

TRANS WORLD AIRLINES, INC.,
Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,
Respondent,

HUGHES TOOL COMPANY,
Intervenor.

Before:

LUMBARD, *Chief Judge*,
SMITH and HAYS, *Circuit Judges*.

---

* * * *

HAYS, *Circuit Judge*:

Petitioner, Trans World Airlines, Inc., seeks review in this court under Section 1006 of the Federal Aviation Act[1] of an order of the respondent Civil Aeronautics Board.[2] The Board's order resulted from a

---

[1] 72 Stat. 795 (1958), as amended, 74 Stat. 255 (1960), 75 Stat. 497 (1961), 49 U. S. C. §1486 (1958 & Supp. V, 1964).

[2] No. E-21057, dated July 10, 1964.

motion by Hughes Tool Company requesting either a disclaimer of jurisdiction or approval under Section 408 of the Act[3] as to acquisition by Toolco of Sinking Fund Notes of TWA in the principal amount of $92,800,000 from the Metropolitan Life Insurance Co. and The Equitable Life Assurance Society of the

---

[3] 72 Stat. 767 (1958), as amended, 74 Stat. 901 (1960), 49 U. S. C. §1378 (1958 & Supp. V, 1964).

The parts of Section 408 which are relevant for this litigation read as follows:

"Consolidation, merger, and acquisition of control—Acts prohibited

(a) It shall be unlawful unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any

Appendix "B"

United States. TWA intervened before the Board opposing the relief requested by Toolco on various grounds. The Board's order, which was issued without holding a hearing, "declared" that Toolco was free to acquire the TWA notes on condition that Toolco divest itself of control over Northeast Airlines, Inc.

---

person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

Application to Board; hearing; approval; disposal without hearing

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction pro-

Appendix "B"

TWA requests that this court vacate and set aside the order, direct the Board "to take no further action" on Toolco's motion "until after determination of the related issues between TWA and Toolco now sub judice," and to afford a hearing at that time to TWA and others on the Toolco motion. Respondent CAB requests that its order be affirmed or the petition for review dismissed and Toolco, which has obtained leave to intervene, requests similar relief.

I. The Factual Background

A. *Previous Orders of the Board*

Beginning about 1939 Howard Hughes bought TWA common stock through Toolco, his wholly owned and controlled corporation, until by 1942 Toolco owned 440,050 shares, 45.6 percent of the total outstanding shares. On application of Toolco in 1944 the CAB held a Section 408 hearing and determined that Toolco had acquired control of TWA through its 45.6 per-

---

posed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition: *Provided further,* That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction."

cent ownership interest.[4] CAB approved this "acqisition of control" because it believed Toolco's operations and plans would not be adverse to the public interest "in view of what might be referred to as the paternalistic attitude which Hughes Tool has exhibited up to the present time."[5] To guard against the possibilities of abuse of Toolco's control of TWA by reason of Toolco's aircraft activities, the CAB imposed conditions on its approval, requiring TWA and Toolco to limit individual transactions between them to items less than $200 in value and total annual transactions between them to $10,000.[6]

In 1947 the Board ordered an investigation to determine whether any "agreement or any arrangement or action related thereto, or any change in the activities of Toolco in the field of aeronautics since [the 1944 order] . . . has resulted or will result in an acquisition of control of TWA" requiring approval under Section 408, and "whether such acquisition of control, if any, is consistent with the public interest and fulfills the conditions of said section 408 . . ."[7] The Board found after investigation and hearing that there was an agreement between Toolco and TWA which gave Toolco the "right to acquire up to a possible 80 percent of the stock in TWA."[8] The Board held "that there can be more than one acquisition of control of

---

[4] Opinion and Order No. 3210, 6 C. A. B. 153, 154-56 (1944).

[5] *Id.* at 156.

[6] *Id.* at 157-58.

[7] Opinion and Order No. E-1735, 9 C. A. B. 381 (1948).

[8] *Id.* at 385.

an air carrier, as a matter of law. . . .,"[9] and "that the term 'control' is not an absolute or unqualified concept, but rather one which may import various meanings and apply to and cover a variety of situations."[10]

The Board determined on these principles that Section 408 approval was required despite prior approval in 1944 because "a controlling person owning a substantial portion of the controlled carrier's stock may have acquired [in 1944] an actual or *de facto* control but not the full and complete legal control which flows from ownership of all, or substantially all, of the issued and outstanding stock of the carrier."[11] The Board ordered a Section 408 hearing to approve or disapprove the "further acquisition of control."[12]

After a hearing the Hearing Examiner found the "further acquisition of control" of TWA by Toolco to require "a rather broad inquiry into the relationships between the controlling and the controlled companies,"[13] and therefore he extensively reviewed the activities of TWA, Toolco, and Hughes since 1944. He found "no conflict of interest between Toolco's present or contemplated aeronautical activities and its control of an air carrier."[14] He held that Toolco and Hughes had contributed "to the welfare and well-

---

[9] *Ibid.*

[10] *Id.* at 386.

[11] *Id.* at 387.

[12] *Id.* at 391-92.

[13] Report of Examiner Edward T. Stodola, 12 C. A. B. 192, 196 (1950).

[14] *Id.* at 216.

being of TWA" by their "efforts at maintaining or improving the carrier's financial position following the war,"[15] and "that the additional control acquired by Toolco . . . is consistent with the public interest."[16] The CAB adopted the findings and conclusions of the Examiner and aproved the acquisition of further control subject to the same conditions imposed in 1944.[17]

In 1960 TWA requested Board approval of a plan for financing the purchase of jet aircraft. The plan provided for the issuance to Metropolitan Life Insurance Co. and Equitable Life Assurance Society of $92,800,000 principal amount of 6½% Equipment Mortgage Sinking Fund Notes of TWA, due December 31, 1972. The TWA stock held by Toolco was placed in a voting trust which was to last until December 15, 1970, unless first terminated or extended as provided in the agreement.

Toolco appointed one of three trustees. The other two, however, were appointed by the notes agent, the Irving Trust Co., and the voting rights in Toolco's TWA stock were to be exercised by majority vote of the three trustees. Under the Option Agreement Toolco had the nontransferable right to purchase outstanding TWA Sinking Fund Notes by payment of the notes in full plus a premium of twenty-two percent until March 31, 1962, when the amount of premium was to be thereafter reduced by one-half percent for each elapsed quarter year.[18] On exercising this option Toolco could terminate the voting trust.

---

[15] *Id.* at 217.

[16] *Id.* at 224.

[17] Opinion and Order No. E-4701, 12 C. A. B. 192-93 (1950).

[18] Order No. E-16195, 32 C. A. B. 1363-64 (1960).

Appendix "B"

Under the Option Agreement Toolco was required to provide satisfactory opinion of counsel stating that all necessary governmental approval had been obtained before it could purchase the notes from the insurance companies and terminate the voting trust.[19]

The Board considered that under this plan "a significant and fundamental change will have been accomplished in the control of TWA by Toolco." The Board stated: "Upon the execution of the voting Trust, the Toolco control of TWA will change drastically in both form and substance."[20]

Believing that "to facilitate TWA's acquisition of jet equipment is in the public interest" and that doubts about the "jurisdiction" of the Board to act should be set aside when its competence to act under Section 408(a) was uncontested, the Board approved the plan, but also stated it anticipated a Section 408(b) application and hearing "before Toolco would attempt to reassume control over TWA."[21]

B. *The Antitrust Action*

In 1961 TWA brought a civil antitrust suit against Toolco, Howard Hughes, and Raymond M. Holliday, a Toolco executive and TWA trustee, in the District Court for the Southern District of New York, seeking some $45,000,000 in damages before statutory trebling, and equitable relief, including Toolco's divestiture of TWA stock. TWA also filed an action in the Chancery

---

[19] *Id.* at 1365 n. 19.

[20] *Id.* at 1364.

[21] *Id.* at 1365.

Court of Delaware against Toolco and Hughes alleging that they had violated their fiduciary duty to TWA, and seeking similar relief. Because of Hughes's failure to depose, default judgment was entered in TWA's favor in the federal court action.[22] On appeal this court affirmed the decision of the district court. The Supreme Court has granted certiorari in this case.[23]

C. *The Order Under Attack*

On April 29, 1964, Toolco filed with the CAB the motion that led to the order now under attack. Toolco stated that it desired "to be in a position to exercise its rights under the aforesaid Option Agreement and if need be thereby to terminate the Voting Trust." Toolco requested that the CAB "either disclaim jurisdiction over the acquisition by Toolco from Metropolitan and Equitable of the $92,800,000 principal amount of Series A Sinking Fund Notes of TWA now outstanding, all in accordance with the aforesaid Option Agreement, or that the Board modify its prior order under Section 408 of the Act or enter an order under Section 408 of the Act granting such authorization or approval as may be necessary to permit such acquisition."

Since this transaction would bring it again under the direct supervision of Toolco and Hughes without the intervention of the two independently controlled

---

[22] *Trans World Airlines, Inc.* v. *Hughes*, 32 F. R. D. 604 (S. D. N. Y. 1963) (Metzner, *D.J.*).

[23] *Trans World Airlines, Inc.* v. *Hughes*, 332 F. 2d 602 (2d Cir. 1964) (Lumbard, *Ch.J.*), cert. granted, 33 U. S. L. Week 3182 (U. S. Nov. 16, 1964) (Nos. 443, 501).

voting trustees, and because it believed that its pending antitrust claims against Toolco, Hughes, and Holliday would be endangered, TWA opposed Toolco's motion. It requested that the motion be denied or stricken on the grounds that Toolco's threatened reassumption of control of TWA was made to circumvent Toolco's antitrust liability and would thus be adverse to the public interest, that the motion in any case required approval as an "acquisition of control" under Section 408(a)(5), and that a full evidentiary hearing was required under Section 408(b) when and if Toolco made a proper application.

The Board issued its order solely on the arguments presented by Toolco and TWA and without any hearing. It held that Toolco's motion did not require a hearing and that "the basic legal question presented is whether or not Board approval is required as a condition to this resumption of control." The Board denied Toolco's motion on the ground that Toolco also controlled Northeast Airlines, and the common control of Northeast and TWA would present a §408 issue never before decided by the Board. Although the Board had previously approved Toolco's control of Northeast,[24] the fact that Toolco's TWA stock was then in a voting trust had made it unnecessary to consider the question of common control at that time.

The Board went on, however, to state:

"The question remains whether, in the absence of common control, the resumption of full man-

---

[24] *Toolco-Northeast Control Case,* Order No. E-18470, dated June 19, 1962, aff'd sub nom. *National Airlines, Inc.* v. *CAB,* 321 F. 2d 380 (D. C. Cir. 1963).

agerial control by Toolco of TWA, following the termination of the voting trust, would in itself require Board approval after hearing under section 408 as an acquisition of control of a carrier by a person engaged in a phase of aeronautics. Since this question has been thoroughly briefed, and in view of the importance of terminating the controversy between the parties on this subject and removing uncertainty as to the application of section 408 to the peculiar facts involved, we find it appropriate to issue a declaratory ruling on the question." (Footnote omitted.)

The Board concluded that the prior orders of 1944 and 1950 authorizing "Toolco's ownership of 73 per cent of the stock of TWA" were not terminated by the Voting Trust Agreement. The Board said:

"In our view of the matter, we need not reach the issue as to whether the voting trust effected a complete insulation of Toolco's control over TWA within the meaning of section 408. Even if we assumed that Toolco temporarily lost all power to control TWA during the period of the voting trust, this fact would not have effected a termination of the Board's prior approval of the Toolco control of TWA under the unique circumstances present here. In our judgment there was involved at most a temporary hiatus in control imposed upon Toolco by the exigencies of TWA's financing requirements. Toolco at all times has retained the beneficial ownership of the stock in question. The trust itself is for a tempo-

rary period of ten years and is terminable prior to the end of that period upon the discharge of TWA's indebtedness to the financial institutions. We find nothing in either the literal language of section 408 or its underlying policy that would require that Toolco be subjected to a second hearing on the very issue which was previously heard and decided by the Board. A contrary reading of the statute would result in harassment of Toolco without vindicating any statutory objectives." (Footnote omitted.)

In a footnote the Board referred to the statement in its 1960 order that it anticipated a Section 408(b) application and hearing "before Toolco would attempt to reassume control over TWA."[25] The Board characterized this as "dictum" because the jurisdictional issue was not then before the Board and it did not have the benefit of "full briefing." "Accordingly, absent control of another air carrier, and upon prior approval of the Board, Toolco would be free to resume full control of TWA without any further hearing." Paragraph 2 of the order of the Board provided:

"It is hereby declared that Toolco may exercise its option to acquire the TWA Notes described herein at such time as it submits a plan satisfactory to the Board which would effectively divest Toolco of the power to simultaneously control both TWA and Northeast."

---

[25] See note 21 *supra* and accompanying text.

Appendix "B"

II. Disposition of the Board's Order

On the principal issue we hold that the Board should have held a hearing before issuing its order permitting Toolco to resume control of TWA and that the declaratory ruling was an abuse of the Board's discretionary power.

Section 408(b) requires a hearing to determine whether the acquisition of control of an airline is in the public interest. Among the criteria of the public interest which the Board must safeguard, according to section 102,[26] are the fostering of "sound economic conditions" in air transportation, and the promotion of service without "unfair or destructive competitive practices."

The Board, when it issued its order, must have been aware of TWA's claims as set forth in its pleadings in the antitrust action. The charges against Toolco included preventing TWA from competing with other carriers by keeping it from acquiring jet aircraft and by diverting to other carriers jet aircraft originally assigned to TWA, and preventing TWA from obtaining necessary financing at reasonable rates. In view of the default in the antitrust action the charges against Toolco stand undenied. They present a picture which is entirely inconsistent with the requirements of the public interest.

The conduct which is the subject of the antitrust action is alleged to have taken place during the years which intervened between the Board's order of 1950 and the voting trust arrangement of 1960. Yet the

---

[26] 72 Stat. 740 (1958), 49 U. S. C. §1302 (1958).

Appendix "B"

Board's order is based upon the investigation and findings preceding its previous orders of 1944 and 1950. A mere reading of the findings of the Board in connection with the previous orders, as we have set those findings forth above, indicates the great difference which exists between the present situation and the situation which obtained in the periods before the 1944 and 1950 orders were issued. In view of the notice which the Board had of changes in the situation during the period since 1950 it could not properly rely on its 1950 order in granting permission to Toolco to resume control of TWA.

Toolco contests the ripeness of the controversy for decision, TWA's standing, and statutory reviewability.[27] We hold this order, which was explicitly intended by the Board to terminate "the controversy between the parties on this subject," ripe for our consideration. The Board has made an authoritative pronouncement on which important transactions are likely to depend.[28] TWA has standing as "any person disclosing a substantial interest."[29] Its identity as the acquired airline satisfied the liberal standing requirement of Section 1006(a). See *City of Houston* v. *CAB*, 317 F. 2d 158, 160 (D. C. Cir. 1963); *Seaboard & Western Airlines, Inc.* v. *CAB*, 181 F. 2d 515, 518

---

[27] See generally 3 Davis, Administrative Law §§21.01-23.20, especially §21.07 (1958 & 1963 Pocket Part). See also Jaffe, *Ripeness and Reviewable Orders in Administrative Law*, 61 Mich. L. Rev. 1273 (1963).

[28] Toolco's exercise of the Option Agreement depends on satisfactory opinion of counsel that all necessary governmental approval has been obtained. Note 19 *supra* and accompanying text.

[29] Federal Aviation Act §1006(a), note 1 *supra*.

(D. C. Cir. 1949), cert. denied, 339 U. S. 963 (1950). Under this same statutory provision in the Civil Aeronautics Act of 1938 this court stated that a competitor of an airline which was granted a certificate of public convenience and necessity possessed a "substantial interest" "because it would be adversely affected by the diversion of traffic to a prospective competitor." *Pan American Airways Co.* v. *CAB*, 121 F. 2d 810 (2d Cir. 1941) (dictum). In this case, TWA as the "victim" in this "acquisition of control" proceeding likewise possesses standing under Section 1006(a).

The reviewability of this "declaratory ruling" under Section 1006(a) depends ultimately on whether it is "an order that determines a 'right or obligation' so that 'legal consequences' will flow from it." *Pennsylvania R.R.* v. *United States*, 363 U. S. 202, 205 (1960). Here the Board expressly intended to determine Toolco's rights under prior orders and it is apparent that Toolco, the Board and TWA will suffer "legal consequences" by reason of that determination.[30] Orders declarative of a party's status under a federal regulatory statute are reviewable. See *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151, 159-60 (1957); *Frozen Food Express* v. *United States*, 351 U. S. 40 (1956); *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 126-44 (1939); 1 Davis, Administrative Law §4.10, at 270-71, 278 (1958).

Toolco claims that the venue of this petition is im-

---

[30] Also significant is the effect this "declaratory ruling" would have in satisfying the requirement of the Option Agreement that all necessary governmental approval be obtained for Toolco to exercise its option. See notes 19, 28 *supra*.

proper under Section 1006(b)[31] because "the principal place of business" of petitioner TWA is Kansas City. TWA asserts by affidavit that its principal place of business is New York, the situs of its executive headquarters. It is unnecessary to decide the issue of venue. Venue is a privilege personal to a defendant in a civil suit and a person intervening on either side of the controversy may not object to improper venue. 4 Moore, Federal Practice ¶24.19, at 147 (2d ed. 1963); see 2 Barron & Holtzoff, Federal Practice and Procedure §593, at 359 (rev. ed. Wright 1961). Although normally an intervenor in a civil suit has a less substantial interest than Toolco has in this proceeding, Toolco had to seek the permission of this court to intervene. By doing so without simultaneously or soon thereafter raising a motion directed to venue, Toolco waived any defense of improper venue it may have possessed as an intervenor. 4 Moore, *op. cit. supra,* ¶24.19, at 147.

Paragraph 2 of the Board's order is set aside and the case is remanded to the Board for action not inconsistent with this decision.

---

[31] Note 1 *supra.*

Appendix "B"

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of December, one thousand nine hundred and sixty-four.

Present: HON. J. EDWARD LUMBARD,
Chief Judge,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges.

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

HUGHES TOOL COMPANY,
Intervenor-Respondent.

A petition for review of an order of the Civil Aeronautics Board.

This cause came on to be heard on the record from the Civil Aeronautics Board and was argued by counsel,

On consideration whereof, it is now hereby ordered, adjudged and decreed that paragraph 2 of the order of said Board be and it hereby is set aside and that the action be and it hereby is remanded to said Board for action not inconsistent with the opinion of this court.

A. DANIEL FUSARO
Clerk

APPENDIX "C"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 29063

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

HUGHES TOOL COMPANY,

Intervenor.

PETITION FOR REHEARING

The Civil Aeronautics Board respectfully petitions the Court to grant rehearing of its decision herein of December 7, 1964, and upon rehearing either to affirm the Board order involved or to clarify and modify its opinion and judgment.

The Board's order (E-21057, A. 202) was not one affirmatively granting permission to Toolco to resume control of TWA. Rather, the Board held that Toolco was presently precluded by Section 408 of the Federal Aviation Act from resuming control of TWA because it controls Northeast Airlines, in that the Board had never approved the common control by Toolco of TWA and Northeast. The Board also held that its 1950 order approving the control of TWA by Toolco

as a person engaged in a phase of aeronautics had not been rescinded by the Board or by operation of law as a result of the 1960 voting trust. Consequently, the Board held that a resumption of TWA control by Toolco upon a divestiture of control of Northeast "would not result in an independent acquisition of control subject to the hearing and approval requirements of Section 408" (A. 207). The Board made no findings as to the circumstances which might warrant or permit it to reexamine the 1950 order of approval or otherwise to preclude Toolco from resuming control of TWA upon a divestuture [*sic*] of control of Northeast. And, since the latter question was not before it, the Board did not determine whether the public interest would not support the resumption or continuation of Toolco's control of TWA.

The Court's opinion of December 7, 1964 states that (p. 308 of slip opinion) ". . . we hold that the Board should have held a hearing before issuing its order permitting Toolco to resume control of TWA and that the declaratory ruling was an abuse of the Board's discretionary power." The opinion goes on to state (*id.*) that "Section 408(b) requires a hearing to determine whether the acquisition of control of an airline is in the public interest"; that "[t]he Board, when it issued its order, must have been aware of TWA's claims as set forth in its pleadings in the antitrust action"; that "[i]n view of the default in the antitrust action the charges against Toolco stand undenied"; that the conduct involved in such charges "intervened between the Board's order of 1950 and the voting trust arrangement of 1960"; and that (p. 309) "[i]n view of the notice which the Board had

of changes in the situation during the period since 1950 it could not properly rely on its 1950 order in granting permission to Toolco to resume control of TWA."

We are uncertain of the basis of the decision. One possible interpretation—the one we consider most likely—is that the Court considered that the Board either has continuing jurisdiction over orders issued pursuant to Section 408 or had reserved such jurisdiction with respect to any resumption of TWA control by Toolco, and that the failure to hold a hearing in reliance upon the prior 1950 order constituted "an abuse of the Board's discretionary power." Another is that a resumption of control of TWA by Toolco would constitute a new acquisition of control within the meaning of Section 408, in which event Section 408(b) proceedings prior to such resumption of control would have been mandatory rather than resting in the Board's "discretionary power." Since an ascertainment of the precise grounds for the Court's decision is important both to the ultimate disposition of the instant controversy and the over-all administration of the Federal Aviation Act, we believe that modification in the Court's opinion is called for irrespective of the grounds for decision. Indeed, if we correctly interpret the opinion, the appropriate decree is one of remand to the Board for further findings.

Appendix "C"

I

The Court's statements that the Board abused its "discretionary power" and that the Board "could not properly rely on its 1950 order" indicate, we think, that the decision well may have rested upon the view that the Board abused its discretion in not instituting evidentiary proceedings. In such event, the decision represents a determination by the Court that the Board erred either in not *sua sponte* initiating proceedings looking to a possible rescission of its 1950 order, or in determining to permit Toolco to resume control of TWA without a hearing notwithstanding a possible reservation of such authority in the 1960 order.[1] Under either view, the Court's decision constitutes a determination concerning a discretionary matter in which the Court did not afford the agency the opportunity to consider and make findings appropriate to the exercise of discretion. Concededly, a discretionary determination by the Board not to hold evidentiary hearings or to reopen a particular proceeding is subject to judicial review.[2] However,

---

[1] See *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), holding that the Board had continuing jurisdiction over Pan American's and Grace's control of Panagra to the extent that such control involves unfair competitive practices. This Court also may have considered that the order entered by the Board in 1960 at the time of the voting trust, quoted at p. 304 of the opinion herein, imposed a requirement upon Toolco that it not resume control of TWA until after Board approval. A specification by the Court of which of these discretionary grounds its opinion rested upon also would be important in the administration of the Act.

[2] *Pan American-Grace Airways* v. *Civil Aeronautics Board*, 178 F.2d 34 (C.A.D.C. 1949); *Nebraska Department of Aeronautics* v. *Civil Aeronautics Board*, 298 F.2d 286 (C.A. 8, 1962); *Flight*

a determination of error on the Board's part requires the reviewing court to consider and reject the reasons ascribed by the agency for its action. *E.g., Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80 (1943).

Whether the Board would conclude that evidentiary hearings are necessary to inquire into the charges contained in the antitrust action, or whether the Court would conclude that a failure to hold hearings for such purpose would constitute an abuse of discretion, are questions which cannot be answered until the Board has exercised its discretion and until the Court has considered and assessed the Board's findings concerning the matter. The fact that the antitrust complaint contains charges which stand undenied because Howard Hughes refused to respond to discovery should not, of itself, serve to require the Board to embark upon protracted proceedings. The Board maintains continuing surveillance over the airlines, and has a great deal of information in its public files concerning the day-to-day operations of the carriers, and the decisions and actions of their management. Such information is obtained in a variety of methods. Recurring reports are required of the airlines, and their management decisions concerning equipment selection, financing, and the like are the subject of scrutiny in formal Board proceedings involving matters such as new route applications and control applications. Thus, the matters alleged in the antitrust complaint were the subject of staff inquiry in relation to the Board's approval of control of

---

Engineers Int'l Ass'n, EAL Chapter v. *Civil Aeronautics Board*, 332 F.2d 312 (C.A.D.C. 1964).

Northeast by Toolco, and, as noted by the Court of Appeals for the District of Columbia Circuit,[3] no evidence was adduced in the Board's proceeding showing any illegal action by Toolco in connection with its control of TWA notwithstanding that any person was at liberty to attempt such a showing. Surely the Court should at least consider any findings which the Board might make in determining not to hold further hearings before it concludes, upon the basis of the limited information available to the Court, that an abuse of discretion has resulted.

Hence, in this view of the case, the appropriate decree is one remanding the matter to the Board for findings on the question of whether an evidentiary hearing is required, reserving judicial review of the question until after those findings have been made.[4]

II

If the basis for decision is that a resumption of previously exercised and Board-approved control after a hiatus occasioned by loss or surrender of the stock voting rights constitutes a new acquisition of control within the meaning of Section 408, then the

---

[3] *National Airlines* v. *Civil Aeronautics Board*, 321 F.2d 380, 384, 385 (C.A.D.C. 1963).

[4] We believe that it should have been incumbent upon TWA to have requested the Board to reexamine the issue of whether a resumption of control of TWA by Toolco would be adverse to the public interest, rather than restricting its contentions before the Board to the legal interpretation of the prior Board orders. The Board's Rules of Practice (14 C.F.R. 302) provide for the filing of complaints and, upon any determination that the Board correctly interpreted its former orders, TWA still has available the remedy of petitioning the Board for further action and thereafter seeking review of the Board's disposition of such petition.

decision obviously is one of major importance and far reaching effect. Such an interpretation would place the burden of a full Section 408 proceeding upon the controlling stockholder and the Board in those instances in which a hiatus in control resulted from the exigencies of financing arrangements, bankruptcy, or possibly even from the turning over of the actual power to control to some other person through proxies and the like. Not only would these burdens result, but there would be an inhibiting effect upon financing arrangements which could have adverse effects upon the airlines.[5] And the uncertain reach of the Court's opinion as applied to varying degrees of transfer or sharing of control (*e.g.*, proxies) raises serious doubt about such a conclusion. We submit that the Board properly held that temporary transfer of voting rights did not have this effect; that Section 408(b) did not apply to the resumption of control of an airline by its principal stockholder which results when he repays a debt and thereby dissolves a voting trust established as security for the debt.

---

[5] Financing institutions not infrequently insist upon a voice in the management of aviation enterprises as a condition to financing arrangements. A voting trust or other method for achieving that result well may be entered into by an air carrier in circumstances in which it is plain that the situation will revert to *status quo* at a later date. On the other hand, if the effect of the arrangement is to require *de novo* proceedings under Section 408 before control may be resumed by the original management, it is only reasonable to assume that the making of such arrangements will be inhibited. Furthermore, Section 408 applies not only to control through stock ownership but to all forms of actual control, and to matters involving equipment leases and operating contracts. If the decision here means that any temporary hiatus with respect to a matter once approved under Section 408 automatically calls for reexamination and reapproval of the relationship, the import of the decision is grave indeed.

Appendix "C"

An interpretation of Section 408 as requiring new Board approvals after such hiatus in a previously approved control is not justified by the fact that a particular Board-approved acquisition of control may, in the light of hindsight, have proved to be unfortunate. This at most lends support to a construction of the Act permitting the Board in its sound discretion to reexamine the situation and to withdraw its prior approval. But the remedying of the situation should not turn on the happenstance of a hiatus in control.

Accordingly, if the basis of the decision is that a resumption of TWA control by Toolco would constitute a new acquisition within the meaning of Section 408(b), we respectfully request that the decision be reconsidered and vacated. In any event, a statutory interpretation of such importance ought not to rest on inference, and public interest considerations require that it be plainly stated.

Respectfully submitted,

LIONEL KESTENBAUM,
Attorney,
Department of Justice.

JOHN H. WANNER,
General Counsel,

O. D. OZMENT,
Associate General Counsel,
Litigation and Legislation,
Civil Aeronautics Board.

* * * *

Dated: December 22, 1964

APPENDIX "D"

Statutes Involved

FEDERAL AVIATION ACT, Section 408, *as amended*
(49 U.S.C. § 1378 (1958), as amended,
49 U.S.C. § 1378(b) (Supp. V, 1964))

Consolidation, merger, and acquisition of control.

(a) Prohibited acts.

It shall be unlawful unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part

thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

(b) Application to Board; hearing; approval; disposal without hearing.

Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other per-

sons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of this title, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition: *Provided further,* That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does

not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

(c) Interests in ground facilities.

* * * *

(d) Jurisdiction of accounts of noncarriers.

Whenever, after the effective date of this section, a person, not an air carrier, is authorized, pursuant to this section, to acquire control of an air carrier, such person thereafter shall, to the extent found by the Board to be reasonably necessary for the administration of this chapter, be subject, in the same manner as if such person were an air carrier, to the provisions of this chapter relating to accounts, records, and reports, and the inspection of facilities and records, including the penalties applicable in the case of violations thereof.

(e) Investigation of violations.

The Board is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating

any provision of subsection (a) of this section. If the Board finds after such hearing that such person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision. (Pub. L. 85-726, title IV, §408, Aug. 23, 1958, 72 Stat. 767, as amended Pub. L. 86-758, §1, Sept. 13, 1960, 74 Stat. 901.)

FEDERAL AVIATION ACT, Section 1005(a), (d)

(49 U.S.C. §1485(a), (d) (1958))

Orders, notices, and service.

(a) Effective date of orders; emergency orders.

Except as otherwise provided in this chapter, all orders, rules, and regulations of the Board or the Administrator shall take effect within such reasonable time as the Board or Administrator may prescribe, and shall continue in force until their further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation: *Provided,* That whenever the Administrator is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the Administrator is authorized, either upon complaint or his own initiative without complaint, at once, if he so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or reg-

ulations, as may be essential in the interest of safety in air commerce to meet such emergency: *Provided further,* That the Administrator shall immediately initiate proceedings relating to the matters embraced in any such order, rule or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this chapter.

* * * *

(d) Suspension or modification of orders.

Except as otherwise provided in this chapter, the Administrator or the Board is empowered to suspend or modify their orders upon such notice and in such manner as they shall deem proper.

* * * *

(Pub. L. 85-726, title X, §1005, Aug. 23 1958, 72 Stat. 794.)

FEDERAL AVIATION ACT, Section 1006, *as amended*

(49 U.S.C. §1486 (1958), as amended, 49 U.S.C. §1486 (c), (d) (Supp. V, 1964))

Judicial review.

(a) Orders, subject to review; petition for review.

Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in

section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) Venue.

A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) Notice to Board or Administrator; filing of record.

A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of Title 28.

(d) Power of court.

Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Admin-

istrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) Conclusiveness of findings of fact; objections.

The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) Review by Supreme Court.

The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28. (Pub. L. 85-726, title X, §1006, Aug 23, 1958, 72 Stat. 795 as amended, Pub. L. 86-546, §1, June 29, 1960, 74 Stat. 255; Pub. L. 87-225, §2, Sept. 13, 1961, 75 Stat. 497.)

Appendix "D"

ADMINISTRATIVE PROCEDURE ACT, Section 10(a)

(5 U.S.C. § 1009(a) (1964))

Judicial review of agency action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review.

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. (June 11, 1946, ch. 324, § 10(a), 60 Stat. 243.)

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 2 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1965

No. 155

HUGHES TOOL COMPANY,

Petitioner,

against

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION

JOHN F. SONNETT,
80 Pine Street,
New York, New York 10005,
Attorney for Respondent,
Trans World Airlines, Inc.

CARL S. ROWE,
25 Broadway,
New York, New York 10004
Attorney for Respondent,
Trans World Airlines, Inc.

Of Counsel:

DUDLEY B. TENNEY,
MARSHALL H. COX, JR.,
ABRAHAM P. ORDOVER,
80 Pine Street,
New York, New York 10005.

July 2, 1965.

INDEX

	PAGE
QUESTION PRESENTED	1
COUNTERSTATEMENT OF THE CASE	2
Prior Board Proceedings	3
TWA's Antitrust Case	6
Toolco's Reacquisition Motion	7
The Board's Order	11
The Court of Appeals Decision	13
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	14
A. Toolco's Purchase of the Series A Notes Would be an Acquisition of Control	16
B. The Board's Order Violated the Hearing Requirements of Section 408(b)	21
C. The Narrow Issue Tendered by the Petition Does Not Warrant Review by This Court	24
(1) *The Board's Legal Theory*	25
(2) *Toolco's Arguments*	28
(3) *TWA's Standing to Sue*	31
CONCLUSION	32

TABLE OF AUTHORITIES

Cases:

Alleghany Corp. v. *Breswick & Co.*, 353 U. S. 151 (1957)	18, 19
Burlington Truck Lines v. *United States*, 371 U. S. 156 (1962)	24
California v. *Federal Power Commission*, 369 U. S. 482 (1962)	24n
Morgan v. *United States*, 298 U. S. 468 (1936)	23n
Morgan v. *United States*, 304 U. S. 1 (1938)	23n

PAGE

North Atlantic Route Transfer Case, 11 C.A.B. 676 (1950) 17

Pan American Airways, Inc., Acquisition of Aeronaves de Mexico, 4 C.A.B. 494 (1943) 17

Pan American Airways, Inc., Acquisition of Aerovias de Guatemala, 4 C.A.B. 403 (1943) 17

Pan American—Panagra Agreement, 8 C.A.B. 50 (1947) 17

Railroad Control of Northeast Airlines, 4 C.A.B. 379 (1943) 17

Rochester Telephone Corp. v. *United States*, 307 U. S. 125 (1939) 17, 19

Social Security Board v. *Nierotko*, 327 U. S. 358 (1946) 25

Toolco-Northeast Control Case, CAB Order No. E-18470 (1962), *aff'd sub nom., National Airlines, Inc.* v. *Civil Aeronautics Board*, 321 F. 2d 380 (D.C. Cir. 1963) 9, 10n, 11, 12, 12n

Transcontinental & Western Air, Inc., Control by Hughes Tool Company, 6 C.A.B. 153 (1944) 4, 8n

Transcontinental & Western Air, Inc., Further Control by Hughes Tool Company, 9 C.A.B. 381 (1948) 4, 17, 27

Transocean-Atlas Case, Control and Interlocking Relationships, 29 C.A.B. 622 (1959) 27n

Trans World Airlines, Inc. v. *Hughes, et al.*, S.D.N.Y. Dkt. No. 61 Civ. 2324, 32 F.R.D. 604 (1963), *aff'd.*, 332 F. 2d 602 (2d Cir. 1964), *cert. dismissed, as improvidently granted, Hughes Tool Company, et al.* v. *Trans World Airlines, Inc.*, No. 443, 380 U. S. 248 (1965), *Hughes Tool Company* v. *Trans World Airlines, Inc., et al.*, No. 501, 380 U. S. 249 (1965) 2, 6, 7, 9, 10n, 11, 26n, 29

Trans World Airlines, Inc. v. *Hughes, et al.*, Civil Action No. 1607, Ch. Ct. Del., Newcastle County 6n

PAGE

Trans World Airlines, Inc., Further Control by Hughes Tool Company, 12 C.A.B. 192 (1950) 4, 8, 9, 17

Civil Aeronautics Board Orders:

Order No. E-16195, Docket 1182 (December 29, 1960) 4, 5, 5n, 8, 26

Order No. E-18470, Docket 11620 (June 19, 1962) 9

Order No. E-10360, Docket Nos. 8061, *et al.* (June 8, 1956) 8n

Order No. E-12604, Docket Nos. 8061, *et al.* (June 4, 1958) 8n

Statutes and Rules:

Administrative Procedure Act of 1946:

§5, 60 Stat. 239, 5 U.S.C. §1004 (1946) 10

§5(d), 60 Stat. 239, 5 U.S.C. §1004(d) (1946) 23n

Federal Aviation Act of 1958:

§408, 72 Stat. 767, as amended, 49 U.S.C. §1378 (Supp. V, 1964) 2, 3, 3n, 4, 10, 11, 12, 16, 20, 26, 27n, 28, 28n, 31

§408(a), 72 Stat. 767, 49 U.S.C. §1378(a) (1958) 3, 15, 16, 16n, 17, 22

§408(b), 72 Stat. 767, as amended, 49 U.S.C. §1378(b) (Supp. V, 1964) 6n, 15, 21, 22, 22n

§1006(a), 72 Stat. 795, 49 U.S.C. §1486(a) (1958) 31

§1006(d), 72 Stat. 795, as amended, 49 U.S.C. §1486(d) (Supp. V, 1964) 15

Rules of the United States Court of Appeals For The Second Circuit:

Rule 25(b) 14

PAGE

Miscellaneous Authorities:

Annual Report of the Civil Aeronautics Board to the Congress of the United States (1963) 9n

Attorney General's Manual on the Administrative Procedure Act (1947) 23n

House and Senate Reports:

H.R. Rep. No. 2171, 86th Cong., 2d Sess. (1960) 22n

S. Rep. No. 1344, 86th Cong., 2d Sess. (1960) 22n

IN THE

Supreme Court of the United States

OCTOBER TERM—1965

No. 155

HUGHES TOOL COMPANY,

Petitioner,

against

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION

Question Presented

The case involves a single question:

Was the Civil Aeronautics Board (the "Board") required to hold a hearing, as Trans World Airlines, Inc. ("TWA") requested, before permitting Hughes Tool Company—a company the Board knew to be then engaged in the terminal stages of bitter litigaton with TWA—to reacquire voting control of TWA by purchasing certain TWA securities from their present holders?

What the petitioner (intervenor below), Hughes Tool Company ("Toolco"), asks this Court to review is a narrow determination by the United States Court of Appeals for the Second Circuit that the respondent TWA is entitled to a hearing before Toolco can acquire control of it, both (a) because Section 408 of the Federal Aviation Act (the "Act") expressly requires a hearing when a person engaged, as Toolco is, in another phase of aeronautics acquires control of an airline, and (b) because in any event —in the unique circumstances of this case—the Board's denial of the hearing which TWA requested amounted to an abuse of discretion.

All the Court of Appeals held was that such a hearing was required. It did not reach, and had no occasion to reach, the substantive question of whether or not Toolco should be allowed to control TWA.

The Board itself has not petitioned for review.

Counterstatement of the Case

This case is another incident in the basic controversy between TWA and Toolco, the central facts of which were presented to this Court last Term in *Hughes Tool Company, et al.* v. *Trans World Airlines, Inc.*, No. 443, and *Hughes Tool Company* v. *Trans World Airlines, Inc., et al.*, No. 501. Certiorari was dismissed in each of those cases as improvidently granted, 380 U. S. 248 and 380 U. S. 249. The exhaustive briefing there and the Court's resultant knowledge of the record facts in the larger controversy permit a summary statement here.

The petition arises out of a last gasp effort by Toolco to assume control of TWA through summary, non-hearing proceedings before the Board and thereafter to substitute

for a judicial determination of TWA's antitrust claims against it whatever other resolution Toolco might see fit to dictate.

The decision below blocked this attempt by setting aside and remanding Board Order No. E-21057 entered July 10, 1964 in *The Matter of the Application of Hughes Tool Company for Approval under Section 408 of the Federal Aviation Act of 1958, as amended, of the Acquisition of Control of Trans World Airlines, Inc.*, CAB Docket No. 1182 [A-202*].

Prior Board Proceedings

Docket No. 1182 was instituted in 1943. Acting pursuant to Section 408 of the Act, the Board in 1944 approved the acquisition of control of TWA by Toolco, which was then and still is a person engaged in an "other phase of aeronautics" within the meaning of the Act.** *Trans-*

---

*References with the prefix "A-" are to pages of the Appendix to Brief for TWA filed with the Court of Appeals, ten copies of which have been filed with the Clerk of this Court; references with the prefix "R." are to pages of the record in the Court of Appeals as certified by the Clerk of that Court.

** Section 408 provides in pertinent part:

"(a) It shall be unlawful unless approved by order of the Board as provided in this section—

* * * * *

"(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever; * * *."

TWA is of course a major American-flag domestic and international air carrier operating under certificates of public convenience and necessity granted by the Board. Toolco is a vast industrial organization which includes among its many interests the development and manufacture of aircraft and related activities including the sale and leasing of aircraft; Toolco also presently controls Northeast Airlines, Inc. ("Northeast"), an air carrier, but it has announced an intention to divest itself of that control and TWA has neither the right nor any desire to object to such divestiture. The issue presented to the Court of Appeals was whether, *assuming such divestiture*, TWA was entitled to a hearing before Toolco could acquire control of it.

continental & Western Air, Inc., Control by Hughes Tool Company, 6 C.A.B. 153 (1944) [A-88]. Toolco had begun purchasing TWA's stock in 1939 and at the time of the hearing owned 46% of it.

In a later proceeding the Board found that Toolco's acquisition of more TWA stock (which increased its ownership to 73% of that outstanding) amounted to a further acquisition of control requiring Board approval under Section 408. *Transcontinental & Western Air, Inc., Further Control by Hughes Tool Company*, 9 C.A.B. 381 (1948) [A-99]. Such approval was granted after a hearing. *Trans World Airlines, Inc., Further Control by Hughes Tool Company*, 12 C.A.B. 192 (1950) [A-187]. Beginning in 1947, Toolco nominated all TWA directors and controlled, dominated and determined in all respects the management of the airline. Toolco's ownership of TWA's stock eventually rose to 78% of that outstanding. The balance is widely held, presently by an estimated 13,000 public stockholders.

In December 1960, as a condition to a series of transactions comprising a comprehensive plan to finance TWA's jet equipment program, Toolco deposited all its TWA stock in a Voting Trust with three trustees. As part of the financing plan, two lending institutions (Metropolitan Life Insurance Company and The Equitable Life Assurance Society of the United States) purchased "Series A Sinking Fund Notes" from TWA, in the principal amount of $92,800,000 (the "Series A Notes"), and they continue to hold all such notes outstanding. Two of the three Voting Trustees are now appointed by these holders of the Series A Notes and the third by Toolco. As a result of these transactions, which were considered by the Board in Order No. E-16195, dated December 29, 1960 [A-191],

plenary power to control TWA as stockholders passed to the Voting Trustees.*

Under the 1960 transaction Toolco was given an option to purchase the Series A Notes from the holders thereof, on certain terms. Exercise of that option would give Toolco the power to name all three Voting Trustees or to terminate the Voting Trust, as it chose. However, in referring to the possibility of Toolco's regaining control of TWA, the Board said in its December 1960 order:

> "* * * the Board wishes to make clear the fact that it would anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA. It is clear that such approval would not be forthcoming without a searching inquiry into

---

* The Board in that order summarized the significance of the change in control as follows:

> "Upon the Board's grant of the requested modification of the limitations of Order 3210, and the consummation of the refinancing plan, a significant and fundamental change will have been accomplished in the control of TWA by Toolco. Upon the execution of the Voting Trust, the Toolco control of TWA will change drastically in both form and substance. No longer will the directors of Toolco be free to enforce their dictates or those of Toolco's controlling shareholder on TWA. Only one of the three voting trustees will represent directly these interests. Two of the voting trustees, selected by the financial institutions, will be independent of Toolco and of Mr. Hughes.
>
> "The voting trustees will not be restricted in their power to approve further financing for TWA, nor in their ability to sell, lease, transfer, hypothecate or otherwise dispose of, or manage TWA's assets. In short, their power to control TWA is as plenary as that of Toolco and its controlling shareholder" [A-195-96].

the public interest factors affecting this control." (Footnotes omitted.) [A-198]*

TWA's Antitrust Case

Creation of the Voting Trust and the election by the voting trustees of an independent board of directors gave TWA—for the first time since Toolco began acquiring its stock in 1939—a management wholly independent of Toolco. One of the early acts of this management was to retain independent counsel to investigate whether TWA had legally enforceable claims against any other persons or corporations. On June 30, 1961, upon the recommendation of such counsel, TWA brought suit in the United States District Court for the Southern District of New York against Toolco, Toolco's 100% stockholder and controlling person Howard R. Hughes ("Hughes"), and a Toolco executive, Raymond M. Holliday. *Trans World Airlines, Inc.* v. *Hughes,* S.D.N.Y., Docket No. 61 Civ. 2324 (the "antitrust case"). In that action TWA sought damages and equitable relief, including divestiture of the TWA stock owned by Toolco, for injuries it suffered as a result of Toolco's violations of the antitrust laws and other wrongful conduct.**

---

* Toolco argues that the court below misconstrues this order in stating that the Board anticipated a Section 408(b) application and hearing before Toolco would attempt to reassume control over TWA (Petition, p. 6n). The Board's decision was not misconstrued. Under Section 408(b) of the Act, except when control is not affected, a hearing is mandatory on any application filed under Section 408—and the Board expressly stated that such an application should be filed. Moreover, the Board's statement that its approval would not be forthcoming without "a searching inquiry into the public interest factors affecting this control", leaves no doubt that the Board contemplated a hearing which would be intensive as well as extensive.

** On April 18, 1962, TWA brought a second action against Toolco and Hughes in the Chancery Court of the State of Delaware, Newcastle County (Civil Action No. 1607), seeking damages and equitable relief for, *inter alia,* injuries suffered by TWA resulting from the breach by the defendants of their fiduciary duties in the exercise of control over TWA. That action also is still pending.

As this Court is aware from its consideration last Term of the record in No. 443 and No. 501, Toolco defaulted in the antitrust case early in 1963, and an order for a default judgment in TWA's favor was entered by the District Court on May 3, 1963; that decision is reported at 32 F.R.D. 604. In an interlocutory appeal, the Court of Appeals for the Second Circuit on June 2, 1964 affirmed the District Court's decision that TWA's complaint stated a good cause of action over which the District Court had jurisdiction and that prior orders of the Board were no defense thereto; in a companion appeal decided in the same opinion, that court also affirmed the District Court's dismissal with prejudice of certain counterclaims asserted by Toolco. That case is reported at 332 F. 2d 602. This Court granted Toolco's petitions to review that decision of the Court of Appeals (379 U. S. 912) but on March 8, 1965, after full briefing and argument, dismissed the writs as improvidently granted.

As a result of these proceedings, all matters at issue between TWA and Toolco in the antitrust case now stand concluded against Toolco and in favor of TWA, except determinations of how much Toolco is to pay to TWA in damages and of what equitable relief is to be granted. The damages (alleged to exceed $45,000,000 before statutory trebling) are to be determined after a hearing before a Special Master, the Honorable J. Lee Rankin. Whether Toolco should be divested of its stock in TWA and what equitable relief TWA is entitled to are questions the District Court has reserved for decision.

Toolco's Reacquisition Motion

On April 29, 1964, while its interlocutory appeal in the antitrust case was *sub judice* before the Court of Appeals,

Toolco filed a motion [A-3] before the Board in Docket No. 1182 in which (as elaborated by subsequent pleadings) it stated its desire and intent to exercise its option to acquire the Series A Notes and thereby invest in itself complete control over TWA. Toolco asked the Board either to disclaim jurisdiction over these transactions or to grant such approvals and authorizations as were required.

Thereafter on May 7, 1964 TWA filed its answer to the Toolco motion [A-10]. Toolco filed a "Motion and Reply" dated May 13, 1964 [A-47] and TWA filed a "Motion and Reply" on May 22, 1964 [A-74]. National Airlines, Inc. and Eastern Airlines, Inc. each filed a petition for leave to intervene [A-35, A-28], and an answer to Toolco's motion [A-40, A-31]. Toolco opposed their intervention [A-44]. National also filed a reply [A-82].

At the time Toolco's motion was put before the Board, no adversary hearing inquiring into Toolco's fitness to control TWA had been had since the conclusion of the *Further Control* case in 1950.* The Board did not lack notice, however, that charges of a most serious nature had been made about Toolco's relations with TWA, both while it was in control of the airline and after the Voting Trust went into effect. As early as Order No. E-16195 in December 1960 the Board itself had noted that "it is evident that Toolco's control of TWA, as exercised through Hughes, has presented substantial problems requiring the Board's attention" [A-197] and that it "would

* Toolco's motion filed May 10, 1956 seeking Board modification of the original 1944 *Control Order* to permit it to sell up to 25 aircraft of its own manufacture to TWA was abandoned after the Board issued an order instituting investigation into the matter; consequently, no investigation was ever held. CAB Order No. E-10360 (Docket Nos. 8061, *et al.*, June 8, 1956); CAB Order No. E-12604 (Docket Nos. 8061, *et al.*, June 4, 1958).

anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA" [A-198]. Toolco's relations with TWA while in control of it were adverted to in the *Toolco-Northeast Control Case* (to which TWA was not a party), CAB Order No. E-18470, June 19, 1962, *aff'd sub nom., National Airlines, Inc.* v. *Civil Aeronautics Board,* 321 F. 2d 380 (D.C. Cir. 1963), although no evidence was received about the charges nor were any findings made.

Finally, and most important, the Board knew of the charges set out by TWA in the antitrust case,* and that Toolco had made what its counsel called a "business decision" to default in that case rather than to defend against them when the cost of defending was to permit the truth to come out in TWA's discovery proceedings under the Federal Rules.

The Court is, of course, familiar with the charges in TWA's complaint [A-210 *et seq.*] in the antitrust case, which were described in great detail in No. 443 last Term (see, *e.g.*, pages 15-18, 36-38, 123-143 of Brief for Respondent in No. 443). Those charges primarily involve events subsequent to the Board's last *Further Control* hearing in 1950 (12 C.A.B. 192 [A-187]) the most important of which occurred from 1955 on when the commercial air carrier industry entered the era of jet transport. It is clear, moreover, that the allegations of the complaint go immediately to the fitness of Toolco to acquire control of an air carrier, since they allege that hereto-

* The Board summarized the complaint in its Annual Report to Congress for 1963, at pages 59-60, as alleging that "* * * the defendants, while in control of an air carrier, had illegally exercised such control to their own benefit and advantage in the area of the financing, purchasing, and the obtaining of equipment by the air carrier."

fore Toolco has abused such control to advance its own interests in the other phases of aeronautics in which it engages—including the sale, leasing and production of aircraft.*

Throughout the proceedings before the Board TWA emphasized that the Board's duty to uphold the public interest alone would require a hearing into the facts of Toolco's misconduct as they affect Toolco's fitness before permitting it to reacquire control of TWA, even if Congress had not—as it has—expressly commanded such a hearing in Section 408 of the Act and in Section 5 of the Administrative Procedure Act [A-18-20 and A-76-80].**

---

* Apart from the allegations of the complaint which stand undenied by reason of Toolco's default, information relating to other abuses of control by Toolco has been developed in the antitrust case. See, *e.g.*, the description of tax manipulations by Hughes and Toolco in connection with aircraft leasing by Toolco to TWA which benefited Toolco and injured TWA as described in Joint Brief for Additional Defendants-Respondents, No. 501 last Term, dated February 18, 1965, pp. 18-21.

** The petition (p. 24) quotes language from the Board's petition for rehearing to the Court of Appeals referring to a staff inquiry into TWA's antitrust claims in connection with the *Toolco-Northeast Control Case, supra.* TWA's answer to this petition for rehearing, which has been filed with this Court as part of the present record [R-479 *et seq.*], corrected the erroneous implication in this language and placed the *Northeast Control* proceeding in its true context. As was there pointed out (pp. 11-22 and Annexes A and B): (1) TWA was not a party to the *Northeast Control* proceeding and had no occasion to present evidence of Toolco's misconduct, (2) the limited inquiry which occurred was expressly stated by the staff to have developed evidence of wrongdoing by Toolco which the staff wished to pursue, but such evidence was for cogent reasons excluded by the examiner and the Board as irrelevant to the urgent question of the survival of Northeast, then before the Board, and finally (3) TWA was expressly advised in writing by the staff almost immediately after this limited inquiry had begun that it would not be pursued solely because of these exclusionary rulings, and that, accordingly, no further evidence would be needed.

The Board's comments in its *amicus curiae* brief, filed last Term in Nos. 443 and 501 (pp. 17-18), do not support Toolco's implication that a full inquiry had been made, and it is obviously significant that no petition for certiorari has been filed on behalf of the Board in the instant case.

In opposing Toolco's motion TWA also called the Board's attention to the Board's own prior statements that Toolco had ceased to control TWA at the end of 1960 and that any resumption of control would require an application under Section 408 of the Act which would be approved only after a searching inquiry [A-16-18], to the Board's reliance in the *Toolco-Northeast Control Case* on the absence of any control by Toolco over TWA [A-17], and to Toolco's repeated statements to the Board and to the courts that it had no control over TWA [A-16-17].

Finally, TWA emphasized that Toolco's reason for attempting to purchase the Series A Notes for over 100 million dollars and thereby acquire control over TWA, was clearly to place itself in a position where it could effectively bar TWA from prosecuting its pending antitrust case against Toolco to a final adjudication [A-10-15, A-75-76]. The damage issues alone present a conflict of interest between TWA and Toolco of the most obvious kind, and of monumental dimensions.

On June 2, 1964 and before the Board had taken any action on Toolco's motion, the Court of Appeals filed its unanimous decision in the antitrust case, 332 F. 2d 602, making it perfectly clear that the claims asserted there against Toolco were within the jurisdiction of the federal courts and would be judicially determined.

The Board's Order

On July 10, 1964, however, with no reference at all to the decision by the Court of Appeals, without further pleadings, without either briefs or oral argument, without any hearing at all into Toolco's fitness, and without any notice in the Federal Register that it intended to dispose of Toolco's application without a hearing, the Board entered an order determining, *inter alia,* that:

(a) Its prior approval of Toolco's original acquisitions of control in 1944 and 1950 extended to the

proposed resumption of control by Toolco even after all power to control had in fact ceased for a period of years. Accordingly, no approval by the Board was required except as to the limited question of the manner in which Toolco proposed to divest itself of simultaneous control over Northeast [A-207-08].

(b) No hearing on the subject of Toolco's fitness to control TWA was now required to be held under the Act, and, since such issues had been considered in the original hearing, no further hearing should be held to avoid *harassment* of Toolco [A-208].

(c) A hearing to consider Toolco's fitness to control TWA, at which its misconduct and anti-trust violations could be considered, together with their grievous effect on TWA, would not "vindicate any statutory objectives" [A-208].

(d) The Board's own statement in Order No. E-16195 that resumption of control over TWA by Toolco would not be permitted without the filing of an application under Section 408, and then only after a searching inquiry, was a dictum not binding upon it which it would therefore disregard [A-208n].

(e) The Board's statements in the *Toolco-Northeast Control* case, including its representations to the Court of Appeals for the District of Columbia which resulted in the affirmance by that court of the Board's order,* that Toolco was not in control of TWA, did not require it to assert jurisdiction except insofar as possible common control over both TWA and Northeast was involved, and were not inconsistent with its determination that control over TWA had never been so relinquished by Toolco as to require further approval by the Board before it could be reacquired [A-205-07].

---

* *National Airlines* v. *Civil Aeronautics Board*, 321 F. 2d 380 (D. C. Cir. 1963).

The Court of Appeals Decision

Ten days later TWA petitioned the Court of Appeals to vacate and set aside the Board's order [R. 246]. On August 4, 1964 that court entered an order granting Toolco's motion to participate in the proceedings as an intervenor. The case was briefed on an expedited basis, and oral argument was heard on September 25, 1964; on December 7, 1964 the Court of Appeals unanimously ruled that Paragraph 2 of the Board's order "is set aside and the case is remanded to the Board for action not inconsistent with this decision" [R. 358] (339 F. 2d at 64). The court's twin grounds were succinctly stated:

> "On the principal issue we hold that the Board should have held a hearing before issuing its order permitting Toolco to resume control of TWA and that the declaratory ruling was an abuse of the Board's discretionary power" [R. 355] (339 F. 2d at 62).

Describing the proceeding under review as an "acquisition of control" proceeding [R. 357] (339 F. 2d at 63), and the Order as "an authoritative pronouncement" [R. 356] (339 F. 2d at 63), "permitting Toolco to resume control of TWA" [R. 355] (339 F. 2d at 62), the court pointed out:

> "Section 408(b) *requires* a hearing to determine whether the acquisition of control of an airline is in the public interest." (Emphasis supplied.) [R. 355] (339 F. 2d at 62)

Since "in view of the default in the antitrust action the charges against Toolco stand undenied" and since these charges "present a picture which is entirely inconsistent with the requirements of the public interest" [R. 355] (339 F. 2d at 62), the court further ruled that, in exercis-

ing any discretion it might have, the Board "could not properly rely on its 1950 order in granting permission to Toolco to resume control of TWA" since it had notice of "changes in the situation during the period since 1950" [R. 356] (339 F. 2d at 63).

Petitions for rehearing were filed both by the Board and by Toolco, and, after TWA had filed an answer, both petitions were denied. Since Toolco had also suggested that its petition for rehearing be heard *in banc,* it was thereupon circulated to all of the active judges of the court in accordance with Rule 25(b) of the Second Circuit's rules. "No active circuit judge having requested that the case be reheard *in banc,* Judge Friendly not participating in the consideration of the petition, the petition [was] denied" [R. 523].

Only the petition of the intervenor Toolco is before this Court since no petition for a writ of certiorari has been filed on behalf of the Board, and the time within which such a petition could have been filed has now expired.

Reasons Why the Writ Should Not Be Granted

The operative portion of Order No. E-21057 reads as follows:

> "2. It is hereby declared that Toolco may exercise its option to acquire the TWA Notes described herein at such time as it submits a plan satisfactory to the Board which would effectively divest Toolco of the power to simultaneously control both TWA and Northeast; * * *" [A-209].

The Court of Appeals set aside that paragraph of the Order on the principal ground that, as a matter of law, TWA was entitled to the hearing it had asked for before the Board could make the determination contained therein. Contrary to what Toolco appears to urge, that court

neither substituted its judgment for that of the Board nor assumed any duties or responsibilities entrusted to the Board; it simply ruled that the Board had erred procedurally and remanded the case to the Board for that error to be corrected. In so ruling the Court of Appeals did nothing more than exercise the "exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board * * *" which Congress had granted to it in Section 1006(d) of the Federal Aviation Act.

Its decision dealt with the unique but undisputed facts of this specific case; it ruled only that a hearing must be held when these peculiar facts are present. Review of that decision by this Court is wholly unnecessary.

A. The decision below is plainly correct since Toolco's proposed purchase of the Series A Notes is an acquisition of control of an air carrier by one otherwise engaged in aeronautics within the reach of Section 408(a) of the Act, and a hearing must be held.

B. The decision is also correct on its alternative ground that the Board's refusal to grant the hearing TWA requested was, under the facts present, and in the light of the careful limitations imposed by Section 408(b) of the Act, an abuse of such discretion to deny hearings on disputed matters coming before it as the Board has been accorded by Congress.

C. In any event, this Court should deny review since the impact of the decision below upon the Board's proceedures and air transportation generally is, at most, minimal. (1) The Board's order involved only a narrow legal interpretation of unique facts, unlikely to recur. (2) The arguments sought to be

made by Toolco are wholly remote from the facts of this (or any other) case. (3) Toolco's attack upon TWA's standing to seek review is frivolous.

A. Toolco's Purchase of the Series A Notes Would be an Acquisition of Control

TWA must of course be accorded the hearing it has demanded if Toolco's exercise of its option to acquire the Series A Notes is an acquisition of control within the meaning of Section 408 of the Act.

From the plain words of the statute* and prior interpretations of those and similar words by the Board, other administrative agencies and the courts, it is clear that Toolco's contemplated purchase of the Series A Notes brings it within the reach of Section 408.

The Board's order issued on the premises that Toolco has not been in actual control of TWA since December 1960 [A-207-08] and that it will resume full managerial control of TWA if it is permitted to exercise its option to acquire the Series A Notes and terminate the voting trust [A-208]. In short, and as a practical matter, if Toolco purchases the Series A Notes, it will "acquire control" of TWA in any usual sense of the word.

Early in its existence the Board considered the meaning of the word "control" in Section 408(a). In a series of cases it reviewed the relevant authorities in other fields of

*The language of Section 408(a) of the Act applicable to the instant transaction provides:

"(a) *It shall be unlawful unless approved by order of the Board* as provided in this section—

* * *

"(5) *For* any air carrier or person controlling an air carrier, any other common carrier, or *any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;* * * *." (Emphasis supplied.)

the law, particularly the law affecting public utilities, and concluded that the control to which the statute referred was not a technical matter but was the actual practical power to influence another entity in the conduct of its affairs. See especially *Pan American Airways, Inc., Acquisition of Aeronaves de Mexico,* 4 C.A.B. 494, 496 (1943); *Pan American Airways, Inc., Acquisition of Aerovias de Guatemala,* 4 C.A.B. 403, 404-05 (1943). The Board could have come to no other conclusion in the light of the decision of this Court in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145 (1939).

Since the statute refers to *practical* control, and whether that exists is a question of fact to be determined after considering all the evidence, the Board also decided in these early cases that any substantial increase "in the extent or effectiveness of control" constituted a separate acquisition requiring the Board's separate approval under Section 408(a). See *Railroad Control of Northeast Airlines,* 4 C.A.B. 379, 381 (1943). This interpretation of "acquisitions" to include increases in the extent or effectiveness of control has been consistently followed by the Board in later decisions. See, for example, *Pan American-Panagra Agreement,* 8 C.A.B. 50, 56 (1947); *North Atlantic Route Transfer Case,* 11 C.A.B. 676, 682 (1950); *Transcontinental & Western Air, Inc., Further Control by Hughes Tool Co.,* 9 C.A.B. 381 (1948); *Trans World Airlines, Inc., Further Control by Hughes Tool Company,* 12 C.A.B. 192 (1950).

That the Board's approach in these earlier cases was clearly correct is seen from this Court's holding under the somewhat similar provision of the Interstate Commerce Act that a rearrangement of control through the merger of one subsidiary of Alleghany Corporation into

another was "an acquisition of control" under that Act. *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957). There the Court said:

> "Not labels but the nature of the changed relation is crucial in determining whether a rearrangement within a railroad system constitutes an 'acquisition of control' under §5(2)." 353 U. S. at 166.

The Court's formula for determining whether a proposed transaction was an acquisition of control was stated as follows:

> "Does the transaction accomplish a significant increase in the power of one over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease? This is the issue, * * *." 353 U. S. at 169.

As the Court said, since the subsidiary to be merged would not thereafter exist, it could not reasonably be said that there had been no increase in the power of Alleghany over such subsidiary:

> "While it is not always profitable to analogize 'fact' to 'fiction,' LaFontaine's fable of the crow, the cheese, and the fox demonstrates that there is a substantial difference between holding a piece of cheese in the beak and putting it in the stomach." 353 U. S. at 170.

There is a similar "substantial difference" between Toolco's ownership of voting trust certificates for TWA stock and "full managerial control" of TWA which Toolco would acquire by purchasing the Series A Notes.

Toolco misreads the *Alleghany* case when it states that this Court there held that any agency determination as to what constitutes an acquisition of control must be upheld if a rational basis exists for the determination (Petition, p. 14). What the Court in fact said was "* * * the finding of the Commission that a given transaction does or does not constitute a significant increase in the power of one company over another is not to be overruled so long as there is warrant in the record for the judgment of the expert body * * *'" 353 U. S. at 169. In the instant case the Board did not even purport to be making a finding as to the consequent change in Toolco's power over TWA, but viewed any such change as irrelevant to whether or not exercise of the option was subject to the provisions of the statute as to acquisitions of control [A-207-08].

Toolco similarly misreads *Rochester Telephone Corp. v. United States, supra.* There the Court affirmed the finding of the Federal Communications Commission, made only after a full hearing, that a control relationship existed—an issue not presented here—but was careful to point out that the range of issues open to review on appeal from an order of an administrative agency included questions affecting not only the "basic prerequisites of proof" but also "statutory authority". 307 U. S. at 139-40. The issue before the Court in the present case was whether the Board had statutory authority to act without a hearing, at which proof would have been adduced. None of the other cases cited by Toolco at page 14 of its Petition has any relationship to the issues here presented and none of them held that a court should not consider whether an agency had statutory authority to act without a hearing.

While in effect disclaiming jurisdiction over Toolco's reassumption of control of TWA, the Board recognized

the practical change in control which must result from Toolco's acquisition of the Series A Notes and determined that the transaction would have legal consequences which can result only from an acquisition of control within the meaning of Section 408 of the Act. If it had not so decided, at least *sub silentio,* the Board (on its own reasoning) would have had no occasion to deny Toolco's request that it disclaim all jurisdiction over the matter raised. Instead it held that Toolco "could not lawfully resume control of TWA" while in control of Northeast without "prior Board approval under Section 408 after hearing" [A-206]. Such a ruling can be explained only on the basis that a "person" (Toolco) "controlling an air carrier" (Northeast) would otherwise "*acquire control* of [another] air carrier" (TWA) without Board approval.

The Board had not previously passed upon the public interest issues involved in simultaneous control of TWA and Northeast by Toolco for the obvious reason that it had not thought, and had had no reason to think, that Toolco was in control of TWA when it acquired control of Northeast after 1960. By ruling that it must pass on the question of common control (and hold a hearing) unless Toolco divests itself of all control of Northeast before acquiring the Series A Notes, the Board can only have concluded that *acquisition of the Notes would be an acquisition by Toolco of control of TWA.* Identical reasoning compels the Board to pass on the acquisition of control alone (and to hold a hearing thereon), since Toolco, even without Northeast, is otherwise engaged in a phase of aeronautics.

B. The Board's Order Violated the Hearing Requirements of Section 408(b)

To the extent here pertinent, Section 408(b) of the Act reads:

> "Any person seeking approval of a [transaction] * * *, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the [transaction] * * *, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the [transaction] * * * will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such [transaction] * * *, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any [such transaction] * * * which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the [transaction] * * *: *Provided, further,* That, *in any case in which the Board determines that the transaction* which is the subject of the application *does not affect the control of an air carrier* directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, *and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice* of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publica-

tion), *may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.*" (Emphasis supplied.)

There was no dispute that TWA had opposed the entry of the Board's order, requested a hearing and had none. What the Board in effect did by its order was to determine that Section 408(b) of the Act does not require a hearing in any case where the Board decides, as a preliminary matter, that the proposed transaction does not come within Section 408(a). The effect of the Board's conclusion was to claim for itself the broadest kind of discretion to deny hearings, under the very section in which Congress has been most careful to grant only a narrow discretion so to act, explicitly limited even in the very special circumstances defined in the final proviso of Section 408(b) to situations in which no interested party had requested one.*

It is pertinent to observe that, without exception, of the cases cited above on page 17 of this brief dealing with the interpretation of "control" under the Act, all were decided only after a full evidentiary hearing on the facts.

* It is surely significant that both the House and Senate Reports recommending to Congress the adoption in 1960 of the final proviso to Section 408(b) explain the new proviso as intended to create in the Board a strictly limited discretion to act in the absence of a hearing, whereas under the statute as it existed before the amendment a hearing was mandatory in all Section 408 transactions. This new discretion, however, was to be available only in situations which could not possibly affect control of an air carrier. See H.R. Rep. No. 2171, 86th Cong., 2d Sess. (1960); S. Rep. No. 1344, 86th Cong., 2d Sess. (1960). The Board made no attempt to comply with the limitations on its discretion set forth in this proviso. For it to act in a matter of this magnitude without a hearing was so plainly contrary to the desire of Congress as to be a clear abuse of discretion, as the Court of Appeals ruled.

This is as true in those cases in which the Board found that no control existed, so that no Board approval was necessary, as in those cases in which the Board found that control did exist and that it therefore had jurisdiction.

The reason for this practice is obvious. When approval is asked of a transaction possibly involving an acquisition of control, entry of an order disclaiming jurisdiction is just as effective to permit consummation of the transaction as the entry of an order approving it. Consequently, for the Board to grant such a disclaimer of jurisdiction without a hearing in any case where, as here, one having a substantial interest has objected runs directly contrary to the manifest intent of Congress that all questions involving control or possible control should be fully investigated.*

* Even if the Act itself did not specifically require a hearing, the provisions of the Administrative Procedure Act would still have required one to be held. The Board's order was clearly declaratory in nature, and Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 1004(d), authorizes an administrative agency to issue a declaratory order only in cases of "adjudication required by statute to be determined on the record after opportunity for an agency hearing." See *Attorney General's Manual on the Administrative Procedure Act*, p. 59 (1947). Since the Board's only authority to issue a declaratory order must be found in the Administrative Procedure Act—Congress having granted it none in the Federal Aviation Act or other applicable statute—the decision of the Court of Appeals setting aside the Board's order for failure to hold a hearing can be sustained on Administrative Procedure Act grounds as well.

Moreover, denial of a hearing under the circumstances here offends not only the Act but the principles of procedural due process outlined in the *Morgan* cases. *Morgan* v. *United States*, 298 U. S. 468 (1936); *Morgan* v. *United States*, 304 U. S. 1 (1938).

C. The Narrow Issue Tendered by the Petition Does Not Warrant Review by This Court

The basic poverty of the petition's arguments is illustrated by Toolco's recurring compulsion to characterize proper court review of agency action as interference in the administrative process.* The Court of Appeals, for example, is at one point accused of attempting to substitute "predetermined legal principles" for "policies enunciated by the [Board]" (Petition, p. 16).

Stripped of semantic obscurity, Toolco's argument is a bald contention that no court can ever review agency action lest administrative expertise should somehow be derogated; the answer is to be found in this Court's decision in *Burlington Truck Lines* v. *United States,* 371 U. S. 156, 167 (1962):

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.'" *New York* v. *United States,* 342 U. S. 882, 884 (dissenting opinion)." (Footnote omitted.)

---

* A truer perspective of the real issues would result in emphasizing a quite different, but equally basic, principle. When, as here, an agency decision might impair prosecution of a pending antitrust suit, the proper appellate function of a court is, as this Court has stated:

> "* * * to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. *Texas & Pac. R. Co.* v. *Abilene Oil Co.,* 204 U. S. 426. The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the [administrative agency]." *California* v. *Federal Power Commission,* 369 U. S. 482, 490 (1962).

And even though the expert determinations of administrative agencies are entitled to great weight, the courts still retain their critically important function of judicial review. As this Court said in rejecting an administrative interpretation of controlling statutory language in *Social Security Board* v. *Nierotko*, 327 U. S. 358, 368-69 (1946):

> "The very fact that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to properly supported findings of fact. Both [*Labor Board* v. *Hearst Publications*, 322 U. S. 111, 131, and *Gray* v. *Powell*, 314 U. S. 402, 411], advert to the limitations of administrative interpretations. Administrative determinations must have a basis in law and must be within the granted authority. Administration, when it interprets a statute so as to make it apply to particular circumstances, acts as a delegate to the legislative power. * * * An agency may not finally decide the limits of its statutory power. That is a judicial function." (Footnote omitted.)

The only question involved in this case is whether TWA —on the facts present—was entitled to a hearing as a matter of law; review of that narrow issue by this Court is not necessary since (1) the decision below determined merely that the Board's legal theory is incorrect as applied to such facts; (2) Toolco's petition ignores this sole issue to concentrate instead on a host of irrelevancies, unconnected with this case; and (3) TWA's standing to object to the treatment accorded it by the Board is plain.

(1) *The Board's Legal Theory.* The Court of Appeals in this instance did not review any exercise of expertise by the Board; it simply reviewed a Board ruling as to the legal effect of certain prior Board orders on TWA's right

to a hearing, concluded that the Board had decided that legal issue wrongly, and remanded to the Board in order that the Board might thereafter consider the public interest questions raised by Toolco's application which it had not considered before.

The Board had asked and answered the wrong question when it sought to determine whether its December 1960 order (No. E-16195) operated to terminate or vacate its 1944 and 1950 orders approving previous acquisitions of control by Toolco and concluded that the order did not have that effect. It does not matter whether Board orders approving prior acquisitions have terminated or will ever terminate, either by their own terms or by formal Board action, since in any event those approvals could extend only to the particular acquisitions of control to which they related.

Section 408 is addressed not to the continuing state of *being in* control, but to specific transactions constituting *acquisitions* of control.* When a person not actually in control of an air carrier purchases securities which carry with them the legal right to exercise voting control over that carrier, that transaction has a specific, separable, readily identifiable effect, which, in the plain language of the statute, can only be described as an acquisition of control. Heretofore, the Board has expressly rejected the contention that its approval of a specific acquisition of control confers some kind of perpetual *carte blanche* on the acquirer; in 1948, referring to a similar Toolco conten-

* As the Board itself stated in its *amicus curiae* brief in Nos. 443 and 501, last Term:

> "Section 408 requires the Board to approve only an 'acquisition of control'; it does not give the Board continuing responsibility for supervision of a controlling person's management of an air carrier." (p. 12)

tion as to the effect of its original 1944 order in this case, the Board said:

> "Indeed, it would be unreasonable to assume that our approval then of Toolco's 45-percent stock interest in TWA would forever constitute an unlimited ratification of any and all future acquisitions of ownership interest in the carrier." 9 C.A.B. at 389 [A-115].

The Board's failure to understand the true situation before it is indicated by its choice of the phrase "temporary hiatus in control" which suggests that it regarded Toolco's proposal as involving a pre-existing control which was to spring up again, after a temporary somnolence, upon the happening of certain extraordinary events not themselves subject to the Board's approval. But Toolco would not be the passive recipient of voting control automatically devolving upon it, for what it proposes is a major financial transaction initiated by itself, which will cost it more than $100,000,000 and involves the purchase of securities never before owned by it and which it has no obligation to purchase. The admitted purpose and intent of the proposed transaction is to acquire the power to vote 78% of TWA's stock, a power which it could not otherwise acquire before 1970 when the voting trust will expire.*

---

* Nor is it material that the voting trust through which Toolco's surrender of control was effected had a life expectancy of ten years. The Board has held that an acquisition of control limited to a short period of time is within Section 408. *Transocean-Atlas Case, Control and Interlocking Relationships,* 29 C.A.B. 622, 624 (1959): "* * * a control relationship exists as long as either the power to dominate or actual domination is present." Even were Toolco's right to reacquire control of TWA when the term of the voting trust expires in all respects indefeasible (contrary to the Board's 1960 ruling), the proposed reacquisition of control before the scheduled termination of the voting trust in 1970 is a separate acquisition of control for the period prior to 1970, and Board approval after hearing is still necessary.

Finally, and apart from whether it rested upon a tenable legal theory, the Board's ruling was concededly narrow in scope; it was made "in view of the importance of * * * removing uncertainty as to the application of section 408 to the peculiar facts involved * * *" [A-207] and purported to deal with nothing beyond "the unique circumstances present here" [A-208]. Nothing in the order indicates that the Board had any thought at the time that it was laying down standards to govern any case broader than that before it.* In view of the narrowness of the Board's order, Toolco's apparent contention that the Court of Appeals was required not only to pass upon the case before it but also lay down guidelines for other and different cases (Petition, p. 18) is nonsense. To have done so would have been the very sort of interference in Board affairs at which Toolco has elsewhere in its petition inveighed.

That no petition has been filed on behalf of the Board hardly supports Toolco's alleged concern that the decision below will seriously handicap the Board in the future exercise of its administrative and supervisory functions.

(2) *Toolco's Arguments.* Most of the arguments urged in the petition relate only tangentially, if at all, either to

* The congeries of horrors which Toolco contends will result from the court's decision are premised either upon misconstruction of what the court in fact did or upon unsupportable generalizations to other entirely different cases. To take a single example, the financing of air carriers can hardly be widely inhibited by a decision that a one-time controlling person subject to Section 408 of the Act, who has completely surrendered control of an air carrier and against whom most serious charges of malfeasance toward that carrier stand undenied, should be subjected to a hearing into fitness before being permitted to reacquire control of the air carrier—especially where the air carrier is then demanding such a hearing. Yet this is all the Court of Appeals held.

the decision of the Board or to that of the Court of Appeals reversing it. Toolco apparently refuses to recognize that the court's sole determination was that, in this case, the Board should have held a hearing.

For example, the Court of Appeals never decided "when and under what circumstances a given relationship should be permitted between a person engaged in a phase of aeronautics and an air carrier" (Petition, p. 16), and indeed could not have so decided since the Board had not considered Toolco's fitness to control TWA at all but—quite the contrary—had determined that Toolco had the legal right in any event to reacquire control under the circumstances present. Toolco's talk of the "regulatory scheme of the Act", though reminiscent of its arguments in Nos. 443 and 501, last Term, is meaningless.

Nor did the court ever decide "when and under what circumstances" Board orders approving an acquisition of control might be terminated (Petition, p. 19) since the only question before the court was whether the orders in question had the legal effect upon TWA's right to a hearing which the Board had ascribed to them.

Toolco's statement that the court, by remanding for a hearing into Toolco's fitness to acquire control of TWA, "imposed upon the CAB its view that it is more consistent with the public interest for the lending institutions to continue in control of TWA, even if that control is in violation of the Act, than for Toolco to assume exercise of the control which the CAB approved" (Petition, p. 20) is a plain absurdity. It is, however, an absurdity which exemplifies Toolco's habitual reliance upon various "non-facts" without any record basis. Regardless of what merit there may be to Toolco's charges against the lending institutions (and Toolco's choice to default in pros-

ecuting its charges reveals its true opinion of their merit), certainly the Board's order did not reflect its judgment that Toolco, in preference to TWA's present management, should direct TWA.

The same references to "non-facts" underlie Toolco's curious argument that TWA's minority stockholders would be better off in some undefined way if Toolco could but regain control of TWA before the damage hearings (in which TWA seeks some $150,000,000 from Toolco) can be held; for Toolco to refer to "conflicts of interest" in this context, as it does (Petition, p. 22), is incredible.

More *Alice in Wonderland* reasoning can be seen in its claim that the Court of Appeals, by remanding to the Board for a hearing, has deprived it of its "contractual right to exercise control over TWA" without affording it "any hearing whatsoever" (Petition, p. 21)—as if it were Toolco which had demanded a hearing and been refused it. Similarly, it asserts that the charges in TWA's antitrust complaint "have never been the subject of a hearing on the merits" (Petition, p. 24) even though it was Toolco's own decision to default rather than let the truth come out which has foreclosed it from any further hearing except as to the amount of damages it must pay TWA.

As for Toolco's contention that TWA had available to it other forms of administrative relief against Toolco, that would be wholly beside the point even if true. TWA was entitled to the hearing it demanded and the Act provides before Toolco should acquire control over it. The court held, as TWA had urged, that exercise by Toolco of its option to acquire the Series A Notes amounted to an acquisition of control as a matter of law, and a hearing into Toolco's fitness was thus required by Section

408; alternatively, the court concluded that the Board had abused its discretion when, over TWA's objection and with knowledge of the serious charges in the antitrust case, it ignored the clear intent of Congress set out in Section 408 that no proceeding under that Section affecting control should be determined without a hearing when a person disclosing a substantial interest is then demanding one.

(3) *TWA's Standing to Sue.* Toolco's final contention —that TWA is not a person "disclosing a substantial interest" in the Board's order—is frivolous.

What Toolco overlooks is that the proceeding from which the relevant order resulted was a proceeding under Section 408. The Board was not interpreting contract rights. Even on its own theory the Board was concerned with orders issued in an earlier Section 408 proceeding as to which TWA would have had clear standing simply as a party to the proceeding in the course of which those orders were formulated.

In any case, as the Court of Appeals observed, the standing requirement of Section 1006(a) is liberal, and, clearly,

> "• • • TWA as the 'victim' in this 'acquisition of control' proceeding • • • possesses standing under Section 1006(a)" [R. 357] (339 F. 2d at 63).

Conclusion

The petition should be denied.

Respectfully submitted,

JOHN F. SONNETT,
80 Pine Street,
New York, New York 10005
Attorney for Respondent,
Trans World Airlines, Inc.

CARL S. ROWE,
25 Broadway,
New York, New York 10004
Attorney for Respondent,
Trans World Airlines, Inc.

Of Counsel:
DUDLEY B. TENNEY,
MARSHALL H. COX, JR.,
ABRAHAM P. ORDOVER,
80 Pine Street,
New York, New York 10005.

July 2, 1965.